No. 01-1127-CFH Title: Bill Lockyer, Attorney General of California, Petitioner
v.
Leandro Andrade

Docketed:
February 1, 2002 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jan 29 2002	Petition for writ of certiorari filed. (Response due March 3, 2002)
	Jan 29 2002	Appendix of petitioner filed.
	Mar 1 2002	Brief of respondent Leandro Andrade in opposition filed.
	Mar 1 2002	Motion of respondent for leave to proceed in forma pauperis filed.
	Mar 13 2002	DISTRIBUTED for Conference of March 29, 2002
	Apr 1 2002	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Apr 1 2002	Petition GRANTED. The case is set for oral argument in tandem with No. 01-6978, Ewing v. California. SET FOR ARGUMENT November 5, 2002.
		**********
	Apr 2 2002	Supplemental brief of petitioner filed.
	Apr 2 2002	Supplemental appendix of petitioner filed
	May 6 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including June 17, 2002.
	Jun 13 2002	Brief of petitioner Bill Lockyer, Attorney General of California filed.
	Jun 17 2002	Brief amicus curiae of California District Attorneys Association filed.
	Jun 19 2002	Brief amici curiae of Criminal Justice Legal Foundation, et al. filed.
	Jul 8 2002	Brief amicus curiae of Michae P.Judge, Los Angeles County Public Defender's Office filed.
	Jul 15 2002	Brief of respondent Leandro Andrade filed.
	Jul 16 2002	Brief amicus curiae of California Public Defenders Association filed.
	Jul 17 2002	Brief amicus curiae of Association of Criminal Defense Lawyers filed.
	Jul 17 2002	Brief amici curiae of Families to Amend California's Three Strikes, et al. filed.
	Jul 17 2002	Brief amicus curiae of Donald Ray Hill filed.
	Jul 19 2002	Application (02A76) for and extension of time within which to file the petitioner's reply brief on the merits, submitted to Justice O'Connor.
	Jul 23 2002	Application (02A76) granted by Justice O'Connor extending the time to file until September 6, 2002.
	Aug 13 2002	Joint appendix filed.
	Sep 6 2002	Reply brief of petitioner Bill Lockyer, Attorney General of California filed.
	Sep 17 2002	Record filed.
	Sep 20 2002	Record filed.
	Sep 24 2002	CIRCULATED.

No. 01-1127-CFH

Entry	Date	Proceedings and Orders
	Nov 5 2002	ARGUED.

011127 JAN 29 2002

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; ERNEST B. ROE, Warden, *Petitioners- Appellees,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; ERNEST B. ROE, Warden, *Petitioners- Appellees,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

QUESTIONS PRESENTED

1. Whether California's three-strikes law, providing for a twenty-five year-to-life prison term for a third strike conviction, violates the Eighth Amendment's prohibition against cruel and unusual punishment when applied to a defendant whose third strike conviction is for petty theft with a prior theft-related conviction?

2. Whether, in light of this Court's existing jurisprudence concerning the Eighth Amendment and proportionality in noncapital cases, the judgment of the California Court of Appeal, holding Andrade's consecutive twenty-five years to life sentences for convictions on two counts of petty theft with a prior, involved an unreasonable application of clearly established federal law as determined by this Court within the meaning of 28 U.S.C. § 2254(d)(1)?

3. Whether the Ninth Circuit or the Fourth Circuit is correct, concerning the necessity for a habeas court analyzing a claim under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, to first decide if the state court's determination was erroneous before deciding whether the determination was contrary to, or involved an unreasonable application of, clearly established federal law as determined by this Court?

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on November 2, 2001. The opinion is reported at 270 F.3d 743 (9th Cir. 2001). A copy of the opinion is attached to this petition, as Appendix A. On November 21, 2001, Petitioner-Appellee's motion to stay issuance of the mandate, was granted. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTION, STATUTES, OR REGULATIONS

United States Constitution, VIII Amendment.
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA)28 U.S.C. § 2254 et seq.

STATEMENT OF THE CASE

On November 4, 1995, Andrade and a female entered a K-Mart store in Ontario, California, and proceeded to the electronics department. Andrade looked around, selected some videotapes and stuffed them inside his trousers. Andrade looked around again, grabbed some more tapes, and stuffed them inside his trousers. After exiting the store without paying for the merchandise, Andrade was stopped and detained by store security personnel. The combined value of the videotapes was $84.70. Appendix A, at 11.

Two weeks later, on November 18, 1995, Andrade and two females entered a K-Mart store in Montclair, California, and proceeded to the electronics department. Andrade selected a videotape and put it down the waist of his pants. Andrade selected two more tapes and went behind a

partition. After exiting the store without paying for the merchandise, Andrade was stopped and detained by store security personnel. The combined value of the videotapes was $68.84. Appendix A, at 11.

Following a jury trial, Andrade was convicted of two counts of petty theft with a prior conviction (Cal. Penal Code §§ 484, subd. (a), 486, 666), and the jury found true additional allegations that Andrade had sustained three prior serious or violent felony convictions within the meaning of California's three-strikes law (Cal. Penal Code § 667, subds. (b) through (i)). Appendix A, at 12. Thereafter, the Superior Court of the State of California in and for the County of San Bernardino sentenced Andrade to two consecutive indeterminate terms of twenty-five years to life in state prison. Appendix A, at 12. Subsequently, the California Court of Appeal, Fourth Appellate District, Division Two, affirmed the judgment, finding the sentence did not violate the Eighth Amendment's prohibition of cruel and unusual punishment. Appendix A, at 12. Thereafter, the California Supreme Court denied further review. Appendix F.

Based on an application made pursuant to 28 U.S.C. § 2254, the United States District Court for the Central District of California denied relief, finding the California Court of Appeal's determination of the Eighth Amendment claim was neither contrary to, nor did it involve an unreasonable application of, clearly established Supreme Court precedent. Appendix D, at 64; Appendix C, at 56-59; Appendix B. Subsequently, the United States Court of Appeals for the Ninth Circuit reversed the judgment of the district court and remanded the matter with instructions to issue the writ of habeas corpus if, within 60 days following issuance of the mandate, the State has not resentenced Andrade. Appendix A, at 43-44.

REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Ninth

Circuit's decision, finding California's three-strikes law as applied in this case violates the Eighth Amendment, decided an important federal question, i.e., the constitutionality of California' principal recidivist sentencing law, in a way that conflicts with, and reaches a conclusion contrary to, relevant decisions of this Court.

2. The United States Court of Appeals for the Ninth Circuit's decision, finding California's three-strikes law as applied in this case violates the Eighth Amendment, conflicts with the standard of review in habeas corpus cases as prescribed by Congress and involves an important question of law that needs to be settled by this Court.

3. The methodology prescribed by the Ninth Circuit for determining whether a state court's determination of a federal habeas is entitled to due deference is contrary to the proper standard of review and in conflict with the decision of another United States Court of Appeals.

ARGUMENT

I.

CALIFORNIA'S THREE STRIKES LAW DOES NOT VIOLATE THE EIGHTH AMENDMENT WHEN IT RESULTS IN A TWENTY-FIVE-YEARS-TO-LIFE PRISON SENTENCE FOR A DEFENDANT CONVICTED OF PETTY THEFT WITH A PRIOR THEFT-RELATED CONVICTION

The Ninth Circuit held California's three-strikes law, as applied in this case, was unconstitutional because the sentence imposed was grossly disproportionate to Andrade's crimes. Appendix A, at 42-43. The decision of the Ninth Circuit was fundamentally flawed because it failed to properly apply this Court's jurisprudence when it evaluated Andrade's sentence.

In the light of Andrade's recidivist status, having previously been convicted of three serious or violent felony crimes as defined by California law, an aggregate indeterminate sentence of fifty years to life in state prison was not one of the "exceedingly rare" terms of imprisonment prohibited as cruel and unusual punishment by the Eighth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), quoting *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3002, 77 L. Ed. 2d 637 (1983).

The question presented, whether California's three-strikes law, providing for a twenty-five year-to-life prison term for a third strike conviction, violates the Eighth Amendment's prohibition against cruel and unusual punishment when applied to a defendant whose third strike conviction is for petty theft with a prior theft-related conviction, is an important federal question because the Ninth Circuit's decision conflicts with relevant decisions of this Court and because of the overarching

importance of the issue to the criminal justice system in California.[1/]

At the heart of the Ninth Circuit's decision is a determination that an Eighth Amendment challenge in a non-capital case requires intercase proportionality review. Within the literature of this Court, there are three modern cases which address the Eighth Amendment and proportionality. In *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), this Court questioned whether the Eighth Amendment includes a proportionality guarantee in non-capital cases. This Court concluded that it could be argued without fear of contradiction by any decision of this Court that, for felonies, the length of the sentence was purely a matter of legislative prerogative. Thus, this Court upheld a life sentence for a defendant who obtained $120.75 by false pretenses, and whose only prior convictions were for fraudulent use of a credit card to obtain $80.00 worth of goods and passing a forged check in the amount of $28.36. *Rummel v. Estelle*, 445 U.S. at 271-72, 274.

Noting that outside the context of capital punishment successful challenges to the proportionality of a sentence have been exceedingly rare, this Court further explained that the state

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1. Notwithstanding the Ninth Circuit's attempt to curtail the impact of its decision, it is widely recognized that, unless repudiated, this decision will open the floodgates of litigation on nearly all three-strikes sentences. See, Greg Winter, "California Appellate Ruling Aids Foes of 3-Strike Law," *The New York Times*, December 10, 2001, at A14 [57% of the 7,000 felons serving life sentences under the California three-strikes law were imprisoned for non-violent offenses, including 644 felons who were convicted of possession of a controlled substance and 340 who were convicted of petty theft]. According to the *New York Times* report, public defenders across the state are digging-up old cases to mount a broad challenge to California's three-strikes law; Los Angeles County public defenders are looking through more than 500 cases involving defendants who received 25 years-to-life sentences, and Kern County public defenders hope to reduce or overturn as many as 350 sentences.

has a legitimate interest in "dealing with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Id.* at 271-72, 285. This Court said the strength of this interest is not necessarily affected by the presence or absence of violence during the commission of the offense, and therefore a state is entitled to separate a recidivist offender from society for a longer period of time than a first-time offender. *Id.* at 284-285.

In *Solem*, the defendant was sentenced pursuant to a state recidivist statute to life imprisonment without the possibility of parole for writing a no account check for $100. *Solem*, 463 U.S. at 281-82. The defendant had six nonviolent prior convictions, "none [of which] was a crime against a person". *Id.* at 279-80. Those convictions included third-degree burglary, grand larceny, obtaining money under false pretenses, and driving while intoxicated. *Id.*. In a five-to-four opinion, this Court adopted a three-prong "proportionality analysis" to determine whether the length of imprisonment constitutes cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 292. This analysis considers the following factors: (1) the gravity of the offense relative to the harshness of the penalty, which may include a consideration of any prior convictions that support the sentence under a recidivist sentencing scheme; (2) the sentences imposed on other criminals in the same jurisdiction for different offenses; and (3) the sentences imposed on criminals in other jurisdictions for the same offense. *Id.* at 292-94, 296-97. After applying this analysis, this Court concluded the defendant's sentence violated the Eighth Amendment. *Id.* at 303. Significantly, while *Solem* embraced a different analysis than that applied in *Rummel*, the *Solem* court twice cited *Rummel* with approval and noted that *Rummel* is controlling ... in a similar factual situation. *Solem*, 463 U.S at 296-97, 304 fn.32. Moreover, the four dissenting justices vigorously disputed the proposition that noncapital cases are subject to a proportionality guarantee, and criticized the majority for ignoring or distorting

the holding in *Rummel*, decided only three years earlier. *Id.* at 304-15.

More recently, in *Harmelin v. Michigan*, this Court found itself irreconcilably split on the question of whether the Eighth Amendment includes a proportionality guarantee in noncapital cases, although it upheld a life sentence without the possibility of parole for possession of more than 650 grams of cocaine. In a separate opinion, two justices held there was no proportionality guarantee in non-capital cases. *Harmelin*, 501 U.S. at 965. In a plurality concurring opinion, three justices agreed that, although the Eighth Amendment does not require strict proportionality between crime and sentence, it does forbid those "extreme sentences which are 'grossly disproportionate' to the crime." *Id.* at 1001.

Finding that the Eighth Amendment included a "narrow proportionality principle", the plurality opinion acknowledged that "its precise contours are unclear." *Id.* at 998. Despite the lack of precision, the plurality opinion identified four principles for determining the "uses and limits of proportionality review." *Id.* at 998. The first principle is that the fixing of prison terms for specific crimes is generally a legislative, rather than a judicial, matter and reviewing courts should therefore grant substantial deference to that authority. *Harmelin*, 501 U.S. at 998-99. The second principle provides that the Eighth Amendment does not mandate any particular penalogical theory and, therefore, state legislatures have plenary power to grant "different weights at different times to the penalogical goals of retribution, deterrence, incapacitation and rehabilitation." *Id.* at 999. The third principle is that the very nature of the federal structure means there will inevitably be marked differences in the theory of sentencing and the lengths of sentences. Thus the states have independent power to articulate societal norms through the criminal law; and the fact that one state has more severe punishment for a particular crime does not, by itself, render the punishment grossly disproportionate. *Id.* at 1000. The fourth principle is that proportionality review should be informed by "objective factors

to the maximum extent possible." *Id.*, *quoting Rummel*, 455 U.S. at 274-75.

In the present case, the Ninth Circuit utilized a *Solem* analysis and compared the punishment and the crime. Regarding the harshness of the penalty, the Ninth Circuit reasoned that because California's three-strikes law has an unique feature depriving a sentencing judge from exercising discretion to impose the sentences concurrently, and because Andrade's sentence may not be reduced by credit for good behavior or working in prison, the penalty was exceptionally harsh where Andrade must serve a minimum of fifty years before he is eligible for parole.[2/] Therefore, the Ninth Circuit found Andrade's sentence substantially more severe than the life sentence involved in *Rummel* and the functional equivalent of the "life without the possibility of parole" sentences involved in *Solem* and *Harmelin*. Appendix A, at 28.

Regarding the gravity of the offense, the Ninth Circuit reasoned Andrade's offenses involved neither violence nor the

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2. The Ninth Circuit is somewhat incorrect in this regard. The Ninth Circuit was referring to California Penal Code, § 667(c)(6), which provides in relevant part that if there is a current conviction for more that one count not arising from the same set of operative facts, the trial court shall sentence the defendant consecutively on each count. However, the Ninth Circuit failed to consider *People v. Superior Court (Romero)* 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789 (1996), and *People v. Garcia*, 20 Cal. 4th 490, 85 Cal. Rptr. 2d 280 (1999). In *Romero*, the California Supreme Court held sentencing courts have the power, pursuant to California Penal Code § 1385, to dismiss strikes in the interests of justice. *Romero*, 13 Cal. 4th at 529-530. In *Garcia*, the California Supreme Court held sentencing courts have discretion to strike prior conviction allegations on a count by count basis. *Garcia*, 20 Cal. 4th at 499-500. Therefore, although technically not discretion to sentence concurrently, a sentencing court can impose a sentence equivalent to concurrent sentences by striking priors as to one or more current convictions.

threat of violence, and that the offenses were elevated to "wobbler" status, i.e., punishable either as a misdemeanor or felony, because of the prior theft-related conviction.[3/] Appendix A, at 30.

Concluding there was an inference of gross disproportionality, the Ninth Circuit then conducted intra-jurisdictional and inter-jurisdictional comparisons of the sentence. On an intra-jurisdictional basis, the Ninth Circuit found Andrade's fifty years-to-life sentence was exceeded in California only by sentences imposed for first-degree murder and a few other violent crimes, and was longer than sentences imposed for other third-strike offenders. Thus, the Ninth Circuit concluded, the comparison supported an inference that the sentence was grossly disproportionate.[4/] Appendix A, at 32.

On an inter-jurisdictional basis the Ninth Circuit acknowledged that four other States have sentencing schemes which imposed lengthy sentences for petty theft where the defendant was a recidivist, but distinguished those jurisdictions from California on various grounds. As to Rhode Island, the Ninth Circuit noted the value of the merchandise Andrade took was too low to qualify as a felony there, and that in Rhode Island the defendant must serve separate terms of imprisonment in order to qualify as an habitual offender, whereas, Andrade's

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3. The Ninth Circuit is incorrect. Under California law, in order to elevate a petty theft to "wobbler" status, the defendant must not only have sustained a prior theft-related conviction, he also must have either served a term in a penal institution for the prior offense, or he must have been imprisoned as a condition of probation for the prior offense. Cal. Penal Code § 666. Thus, the prior offense must have been something more serious than a simple petty theft.

4. The Ninth Circuit's analysis is somewhat strained. The Court compared Andrade's aggregate sentence, which is actually two sentences imposed consecutively, to the maximum sentences for single convictions and to three-strikes sentences imposed for only one current conviction.

prior convictions arose in a single proceeding. As to West Virginia, the Ninth Circuit noted the West Virginia Supreme Court has held that a life sentence imposed on a non-violent recidivist violates that State's constitution. Regarding Texas, the Ninth Circuit conceded Andrade could receive up to forty years in prison but noted Texas has a generous parole policy. Regarding Louisiana, the Ninth Circuit concluded that a sentence such as Andrade received would be vulnerable to challenge as excessive under the Louisiana Constitution. In sum, the Ninth Circuit concluded "[t]he possibility Andrade might have received a comparable sentence in other jurisdictions does not render his sentence constitutional under the Eighth Amendment." Appendix A, at 35-41.

As is plainly evident, the Ninth Circuit's decision is a result-oriented decision. Moreover, the Ninth Circuit failed to apply *Solem's* three-prong "proportionality analysis" in a reasonable, even-handed manner. Both the gravity-of-the-offense/harshness-of-penalty analysis, as well as the intra-jurisdictional analysis, founder on substantially incorrect factual predicates. Moreover, the disingenuity of the inter-jurisdictional analysis is clearly revealed by the Ninth Circuit's conclusion which essentially provided that, even if an inter-case proportionality analysis supported Andrade's sentence, the Ninth Circuit would nonetheless find it unconstitutional.

More importantly, the Ninth Circuit completely failed to follow the revised *Solem* analysis as articulated in *Harmelin*. Rather the Ninth Circuit focused on how Andrade's crimes would have been viewed had they been first offenses, persistently referring to them as misdemeanor conduct. However, in California they were not misdemeanors. The People of the State of California, by their duly elected Legislature, have determined that once a person has been convicted of a theft-related offense and served jail-time or a prison term for that offense, a subsequent theft is a felony regardless of the value of the property taken. As *Harmelin* implicitly recognized, the California Legislature has plenary authority to make that determination.

In fact, any suggestion that the conduct is misdemeanor in nature misses the point. The California Legislature's determination that the theft of property of any value is a felony if there is a prior theft-related offense, is no different than the legislature's determination that theft of property exceeding a value of $400 is a felony. California Penal Code § 487, subdivision (a). Both involve the legislature drawing lines that reflect its conclusions regarding society's interests. Surely, the California Legislature is entitled to conclude that a person who demonstrates a willingness to commit serious or violent felonies on more than one occasion, and who subsequently demonstrates a continued unwillingness to be law-abiding, no matter how trivial the offense, poses a significant danger to society. Nothing in the Constitution requires society to wait for another person to be victimized by another serious or violent crime before isolating such a defendant who has demonstrated a propensity for serious or violent crime, for a substantial period of time. Thus, the Ninth Circuit gave no deference, let alone substantial deference, to the California Legislature's broad authority to determine the types and limits of punishments for crimes.

Moreover, the People of the State of California, by their duly elected Legislature and by ballot initiative, have determined that a person who commits a serious or violent felony on two or more occasions and who subsequently commits another felony offense, albeit not a serious or violent felony, poses a significant danger to society such that he or she must be imprisoned for no less than twenty-five years to life. Such a determination clearly comports with the second *Harmelin* principle. No consideration of this principle is apparent in the Ninth Circuit's decision.

Additionally, the Ninth Circuit's analysis completely failed to consider (or even acknowledge), the third *Harmelin* principle. The fact that California's recidivist sentencing scheme may be the most harsh amongst the states does not render it unconstitutional; one state has to be the most severe. Moreover, any suggestion to the contrary ignores the fact that

California's situation is simply different than that of the other states. California has the largest population and, accordingly, the greatest crime problem and greatest problem with criminal recidivism. California is entitled to evaluate the relationship between the crime rate and recidivism, and incapacitate habitual offenders in accordance with its construction of the results. If the State's independent power to articulate societal norms through its criminal law is to be respected, a great deal more consideration must be shown than is apparent in the Ninth Circuit's decision.

Finally, the Ninth Circuit failed to be guided by objective factors to the maximum extent possible. Instead, it relied on subjective factors. For example, because Andrade was thirty-seven years old at the time of his sentencing and the life expectancy of a thirty-seven-year-old American male is seventy-seven years, the Ninth Circuit found Andrade's sentence the functional equivalent of a life without the possibility of parole sentence. Appendix A, at 28-29. The Ninth Circuit's reasoning manifests the very problem the *Harmelin* plurality tried to address when it mandated the use of objective factors, i.e., it results in an unworkable system. For example, would the sentence imposed on Andrade be constitutional if Andrade had been twenty years old at the time of sentencing? Would it be constitutional if it resulted in two consecutive twenty-year sentences with parole eligibility after a minimum of forty years, i.e., when Andrade was still within his life expectancy? What if the National Center for Health Statistics revises its estimate of the life expectancy of a 37-year-old American male? Surely, the various health profiles of defendants will affect their life expectancies. Therefore, to what extent is a defendant's individual health status at the time of sentencing a factor in the constitutionality of a sentence?

After all is considered, when determining whether California's three-strikes law, as applied, was constitutional, it appears the Ninth Circuit failed to be guided by the criteria presented in this Court's most recent opinions. Thus, the Ninth Circuit has decided an important question of federal law in a

way that conflicts with relevant decisions of this Court. Further, as noted in footnote 1, *infra*, if left unchecked, the decision in the instant matter will open the floodgates of litigation to unprincipled federal review of thousands of sentences in California. Therefore, a writ of certiorari should issue.

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II.

THE NINTH CIRCUIT FAILED TO AFFORD THE STATE COURT'S DETERMINATION, THAT ANDRADE'S SENTENCE DID NOT VIOLATE THE EIGHTH AMENDMENT, DUE DEFERENCE

In the course of resolving Andrade's appeal, the California Court of Appeal held Andrade's sentence did not violate the Eighth Amendment prohibition of cruel and unusual punishment. Appendix E, at 76-79. In 1998, long after enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214, Andrade filed an application pursuant to 28 U.S.C. § 2254. The district court denied the application finding the state-court decision was neither contrary to, nor did it involve an unreasonable application of, clearly established federal law as determined by this Court. Maintaining it applied a de novo standard of review, the Ninth Circuit reversed the judgement of the district court. Appendix A, at 7, 43-44.

The Ninth Circuit's decision is flawed. In light of the conflict and lack of clarity in the existing jurisprudence concerning the Eighth Amendment and proportionality, it cannot be said that the state-court determination involved an unreasonable application of clearly established federal law as determined by this Court within the meaning of 28 U.S.C. § 2254(d)(1).

28 U.S.C. § 2254(d)(1) provides that an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court. "Federal law as determined by this

Court" refers to "the holdings, as opposed to the dicta of [the Court's] decisions as of the time of the relevant state court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The federal court independently determines whether a rule is "clearly established" for this purpose. *Id.* at 382. To make this determination, the federal court employs the same analysis used to determine whether a rule is "old" under the doctrine of *Teague v. Lane*,[5] except that the court looks only to this court's jurisprudence. *Id.* at 380-84, 412, 416. Thus, for § 2254(d)(1) purposes, a rule is "clearly established" if it is "'dictated by precedent at the time the defendant's conviction became final.'" *Id.* at 381, *quoting Teague*, 389 U.S. at 301.

A rule is not dictated by precedent if a survey of the existing legal landscape shows reasonable jurists differ about the outcome. *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990); *see also, Butler v. McKellar*, 494 U.S. 407, 415, 110 S. Ct. 1212, 108 L. Ed. 2d 307 (1990) [stating *Teague* test as whether a rule is "susceptible to debate among reasonable minds"].

Williams addressed the distinction between the "contrary to" and "an unreasonable application of" provisions of § 2254(d)(1). A state court decision can be contrary to this Court's "clearly established" precedent in two ways: (1) if the state court applies a rule that contradicts the governing law set forth in this Court's jurisprudence; or (2) if the state court confronts facts materially indistinguishable from a relevant precedent of this Court and arrives at a result opposite to the one this Court reached. *Williams*, 529 U.S. at 405-06. A state court decision can also involve an unreasonable application of this Court's precedent in two ways: (1) if the state court identifies the correct governing legal rule from this Court's jurisprudence but unreasonably applies it to the facts of a particular case; or (2) if the state court either unreasonably extends a legal

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5. 389 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

principle from this Court's jurisprudence to a new context where it should not apply, or unreasonably refuses to extend the principle to a new context where it should apply. *Williams*, 529 U. S. at 407.

Although the term "unreasonable" is difficult to define, in light of the fact that Congress specifically used that word and not a word such as "erroneous" or "incorrect", an unreasonable application of federal law is different from an incorrect application of federal law. *Id.* at 410-11. Therefore, a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court decision applied clearly established federal law erroneously or incorrectly; for a grant of habeas corpus relief the state court decision must also be objectively unreasonable. *Williams*, 529 U. S., at 409, 411.

In this case, the Ninth Circuit held that, in the light of *Rummel*, *Solem* and *Harmelin*, the law governing the application of the Eighth Amendment to non-violent offenders sentenced to life in prison was clearly established by the time of the State court's determination. Appendix A, at 41. In this regard, the Ninth Circuit chides the State court for relying almost exclusively on *Rummel* and disregarding *Solem*. Appendix A, at 41-42.

The Ninth Circuit's analysis is difficult to accept given that this Court's most recent treatment of the Eighth Amendment and proportionality review demonstrates a far from clear assessment. *United States v. Kratas*, 45 F.3d 63, 67 (4th Cir. 1995) [it is unclear in light of *Harmelin* whether *Solem's* three-part proportionality test is still relevant in non-capital cases]. In fact, this Court has said as much. In *Harmelin*, Justice Scalia expressly stated that *Solem* " was scarcely the expression of clear and well-accepted constitutional law." *Harmelin*, 501 U.S. at 965. Similarly, Justice Kennedy said that, although they could be reconciled, this Court's "proportionality decisions have not been clear or consistent in all respects" and that, although this Court's decisions have recognized a proportionality principle, its "precise contours are

unclear." *Harmelin*, 501 U.S at 996-998.

Had the Ninth Circuit properly reviewed the State court's decision it would have recognized that the application of the Eighth Amendment to noncapital cases involving non-violent offenders was far from clearly established. In light of *Harmelin*, it appears this Court has found proportionality a factor in capital cases and in non-capital cases which involve a "life without the possibility of parole" sentence. It certainly does not establish that proportionality is a factor to be considered in sentences for a term of years, particularly since *Rummel* supports an opposite conclusion. Moreover, as Circuit Judge Sneed's concurring in part and dissenting in part opinion in the instant matter noted, "in the wake of *Harmelin*, not a single court has struck down the sentence of an habitual offender on Eighth Amendment grounds." Appendix A, at 48-49. Thus, as the dissent concludes, even if the State court determination was incorrect, it was not unreasonable. Appendix A, at 52-53.

After all is considered, when determining whether State court's determination that Andrade's two consecutive 25-years to life sentence for two counts of petty theft with a prior conviction, involved an unreasonable application of clearly established federal law as determined by this Court within the meaning of 28 U.S.C. § 2254(d)(1), it appears the Ninth Circuit failed to be guided by the criteria presented in this Court's most recent opinions. Thus, the Ninth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Moreover, the Ninth Circuit's refusal to follow the dictates of the AEDPA undermines the careful balance Congress struck when it enacted that law, between the state and its courts on one hand, and the federal courts on the other. Therefore, a writ of certiorari should issue.

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III.

THE METHODOLOGY PRESCRIBED BY THE NINTH CIRCUIT IS CONTRARY TO THE STATUTORY STANDARD OF REVIEW AND IN CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS

The question of whether, in determining if a state court's determination of a federal constitutional claim is entitled to deference, the federal habeas corpus court must first decide if the state court's determination was erroneous before deciding whether the determination was contrary to, or involved an unreasonable application of, clearly established federal law as determined by this Court, concerns the correct methodology to be applied by a federal court in analyzing a habeas corpus claim under the standard of review prescribed by 28 U.S.C. 2254(d)(1). A writ of certiorari should be granted because the Ninth Circuit has entered a decision on this important matter that conflicts with the relevant decisions of this Court, and conflicts with a decision of the United States Court of Appeals for the Fourth Circuit.

In *Van Tran v. Lindsey*, 212 F.3d 1143, 1154-1155 (9th Cir. 2000), cert. denied 531 U.S. 944, 121 S. Ct. 340, 148 L. Ed. 2d 274 (2000), the Ninth Circuit held that, when analyzing a habeas corpus claim utilizing the standard of review prescribed at § 2254(d)(1), before deciding whether the state court determination was contrary to, or an unreasonable application of clearly, established federal law as determined by this Court, a federal court must first consider whether the State court's determination was clearly erroneous. According to *Van Tran*, such a methodology promotes clarity in the Ninth Circuit's own constitutional jurisprudence and provides guidance to the state courts which can look to the federal courts' decisions for their persuasive value. *Van Tran* 212 F.3d at

1155.[6] *Van Tran* also cited *Weeks v. Angelone*, 528 U.S. 225, 235-237, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000), where this Court rendered an independent decision on the merits of the petition based on this Court's precedents and then determined whether the AEDPA provisions barred relief, is support of its holding.

In *Bell v. Jarvis*, 236 F.3d 149, 161-162 (4th Cir. 2000), *cert. denied sub. nom Bell v. Beck*, ___ U.S. ___, 122 S. Ct. 74, 151 L. Ed. 2d 39 (2001), the Fourth Circuit rejected the *Van Tran* methodology. *Bell* explained that the *Van Tran* requirement seemed to be predicated on a decision to equate an "unreasonable" state court decision within the meaning of § 2254(d)(1) purposes with one that is "clearly erroneous." *Bell*, 236 F.3d at 162, fn. 9. Citing this Court's *Williams* decision, *Bell* held that "unreasonable" and "clearly erroneous" could not be equated. *Id.* at 162. *Bell* further noted that, in *Francis v. Stone*, 221 F.3d 100, 110 (2d Cir. 2000), the Second Circuit concluded the *Van Tran* requirement focuses on how sure the federal court is that the state court erred, rather than on whether the state court decision revealed an "increment of wrongness beyond error." *Id.* at 162. *Bell* thus rejected the idea that a federal court's independent opinion on the merits of any constitutional claims could have any determinative effect on a case, or any precedential value for state courts, finding such an independent opinion would constitute, at best, a body of constitutional dicta. *Id.* at 162.

Concerning *Van Tran*'s suggestion that the methodology which it adopted would provide guidance to the state courts, *Bell* observed there were no persuasive reasons for federal habeas courts to offer opinions on constitutional questions in order to provide guidance to the state courts, nor was there any reason to presume state courts needed the

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6. This reasoning evidences the conceit of that federal court that it knows the Constitution better than the state courts. In light of the AEDPA, it appears Congress has decided otherwise.

guidance. *Bell*, 236 F. 3d. at 162. Finally, *Bell* rejected *Van Tran's* reliance on *Weeks*, concluding it could find no implied requirement that lower federal courts are to render an independent decision on the merits of a claim and noting that *Weeks* did not require such a methodology. *Id.* at 161, fn. 8.

In the present case, citing *Van Tran*, the Ninth Circuit first addressed the correctness of the State court's determination and decided it was incorrect. The Ninth Circuit then concluded the state-court determination involved an unreasonable application of clearly established Supreme Court law. Finding the state-court determination irreconcilable with *Solem*, the Ninth Circuit then held the state-court determination was "clear error." Appendix A, at 18-19, 41-43.

Thus, the Ninth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, and with a decision of the Fourth Circuit. As *Bell* anticipated, the Ninth Circuit has equated "unreasonable" with clearly erroneous. But as the Second Circuit implied in *Francis*, 221 F.3d at 110, equating those terms fails to address an "increment of wrongness beyond error." Moreover, that "increment" seems implicit in section 2254(d)'s requirement, as construed by *Williams*, 529 U.S. 363, that relief cannot be granted unless the erroneous state court determination is also "objectively unreasonable." *Id.*, at 405-409. Thus, the Ninth Circuit's determination conflicts with this Court's decision in *Williams*.

In addition, the Ninth Circuit's methodology leads to the inefficient use of judicial resources. Continued adherence to *Van Tran's* mandate forces habeas courts to waste resources determining if a state court determination was wrong, and then deciding if there is clear precedent to the contrary. Thus, the *Van Tran* methodology always requires a habeas court to engage in two analyses. Under the Fourth Circuit's approach, however, a habeas court can resolve a petition more efficiently by first determining if there was no precedent, and going no further if the answer is no.

Finally, the Ninth Circuit's determination here fails to take into account this Court's more recent decision in *Penry v. Johnson*, 532 U.S. 782, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001). In *Penry*, this Court first determined whether the state court determination was contrary to, or an unreasonable application of, this Court's established precedent. Concluding that the state court's determination did not violate either prong of the statutory standard of review, this Court held the defendant was not entitled to any relief. *Penvy*, 121 S. Ct. at 1919. In so doing, this Court at least impliedly rejected the *Van Tran* methodology Nevertheless, the Ninth Circuit persists in marching to the beat of its own drum.

After all is considered, when deciding the manner for determining if a state court's determination of a federal constitutional claim is entitled to deference, it appears the Ninth Circuit failed to be guided by the criteria presented in this Court's most recent opinions and entered a decision in conflict with the decision of another United States Court of Appeals. Therefore, a writ of certiorari should issue.

CONCLUSION

Accordingly, Petitioners-Appellees respectfully request a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Dated: January 28, 2002

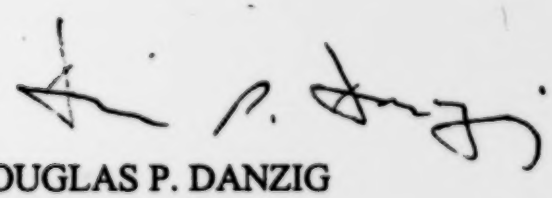
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(2) Supreme Court U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, Attorney General of the State of California;
ERNEST B. ROE, Warden, *Petitioners-Appellees,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

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IN THE SUPREME COURT OF THE UNITED STATES

No.

ERNEST B. ROE, Warden, *Petitioner-Appellee,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

Dated: January 28, 2002

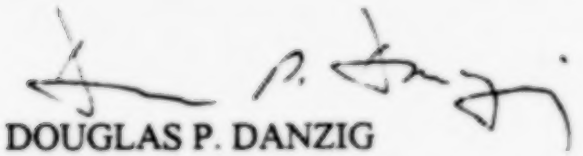
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APPENDIX A

APPENDIX A

[Filed 11/2/2001]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEANDRO ANDRADE,	)	
Petitioner-Appellant,	)	No. 99-55691
v.	)	D.C. No. CV 98-
	)	6776-CAS (SH)
ATTORNEY GENERAL OF	)	
THE STATE OF CALIFORNIA;	)	OPINION
ERNEST B. ROE,	)	
Warden,	)	
Respondents-Appellees.	)	
	)	

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted
May 25, 2001--San Francisco, California

Filed November 2, 2001

Before: Mary M. Schroeder, Chief Judge, and
Joseph T. Sneed and Richard A. Paez, Circuit Judges.

Opinion by Judge Paez;
Concurring and Dissenting Opinion by Judge Sneed

SUMMARY

Criminal Law and Procedure/Sentencing

The Court of appeals reversed a judgment of the district court. The court held that the Eighth Amendment proscribes a sentence of 50 years to life under California's Three Strikes Law for two shoplifting offenses involving nine videotapes worth a total of $153.54 by a defendant with several previous convictions for non-violent offenses.

Appellant Leandro Andrade, a non-violent recidivist, was convicted in the Superior Court of California of two counts of petty theft for shoplifting nine videotapes worth a total of $153.54 from two K-Mart stores. California generally treats such offenses as misdemeanors, each punishable by up to six months in county jail and up to a $1,000 fine. However, because Andrade had been convicted of several prior offenses–all non-violent–his petty thefts were first enhanced to felonies as allowed under the California Penal Code, and then enhanced again to third and fourth strikes under California's Three Strikes and You're Out Law (the Three Strikes Law). Andrade's three 1983 burglary convictions were charged as his first two strikes. Andrade was sentenced to 25 years to life for each petty theft with a prior conviction, to be served consecutively as required by the Three Strikes law. Andrade would not become eligible for parole until 2046, after serving 50 years, when he would be 87 years old.

The California Court of Appeal affirmed Andrade's conviction and sentence, rejecting Andrade's claim that his sentence was cruel and unusual punishment under the Eighth Amendment. The California Supreme Court denied Andrade's petition for review without comment.

Andrade filed a pro se petition for a writ of habeas corpus in federal district court. The district court denied his petition, adopting the magistrate judge's report and recommendation that

stated that the state court's conclusions were reasonable applications of federal law. Andrade deposited in the prison mail system a Motion for Order Extending Time for Appeal, stating that "Leandro Andrade respectfully requests . . . and adding 60 days in which to file his notice of appeal." The district court denied the motion. Andrade deposited a Notice of Appeal in the prison mail system. the district court entered an order denying Andrade a certificate of appealability.

Andrade appealed his sentence. The court of appeals granted him a certificate of appealability to raise his Eighth Amendment claim.

[1] A timely motion for extension of time to file a notice of appeal may be considered the functional equivalent of a notice of appeal provided it gives notice of the three elements required by the Federal Rules of Appellate Procedure. Andrade's motion for extension of time satisfied the three notice requirements: it identified the judgment at issue, it specified the court to which the appeal would be taken, and it was delivered to both the district court and the opposing party.

[2] The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishments. The issue was whether this amendment proscribed a sentence of 50 years to life for two shoplifting offenses involving nine videotapes worth a total of $153.54 by a defendant with several previous convictions for non-violent offenses.

[3] The Supreme Court has held that a proportionality analysis under the Eighth Amendment must be applied to terms of imprisonment. The Court established three objective criteria to guide the proportionality analysis under the Eighth Amendment: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. **[4]**

Following the three-factor test, it had to be concluded that: (1) Andrade's punishment of 50 years to life raised an inference of gross disproportionality when compared to his two petty thefts of nine videotapes worth $153.54, even in light of his prior felony and misdemeanor convictions; (2) Andrade's sentence was substantially more severe than sentences for most violent crimes in California and is unusual even when compared to other applications of California's Three Strikes law; and (3) Andrade could not have received such a severe sentence anywhere else, with the possible exception of Louisiana. Andrade's sentence was so grossly disproportionate to this crime that it violated the Eighth Amendment to the United States Constitution.

[5] Under AEDPA, relief may be granted only if the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. **[6]** The law governing the application of the Eighth Amendment to non-violent offenders sentenced to life imprisonment was clearly established by the time of the California Court of Appeal's decision. **[7]** The state court's failure to address applicable precedent yielded an unreasonable conclusion that a non-violent recidivist sentenced to such a severe sentence for two misdemeanor offenses did not raise an inference of gross disproportionality. Its conclusion that Andrade's sentence did not violate the Eighth Amendment was irreconcilable with Supreme Court precedent and thus constituted clear error. **[8]** Andrade's sentence of life imprisonment with no possibility of parole for 50 years was grossly disproportionate to his two misdemeanor thefts of nine videotapes, even in consideration of his history of non-violent offenses. The judgment of the district court had to be reversed.

Judge Sneed concurred in part and dissented in part, writing that Andrade's sentence was not an unreasonable application of clearly established federal law, because a rational basis existed for the state of California to conclude that the

interests of society were best served by Andrade's incarceration for a minimum of 50 years.

COUNSEL

Erwin Chemerinsky, University of Southern California Law School, Los Angeles, California, for the petitioner-appellant. Robert M. Foster, Deputy Attorney General, and Douglas P. Danzig, Deputy Attorney General, San Diego, California, for the respondents-appellees.

OPINION

PAEZ, Circuit Judge:

Appellant Leandro Andrade was convicted in the Superior Court of California of two counts of petty theft for shoplifting a total of nine videotapes from two K-Mart stores. California generally treats such offenses as misdemeanors, each punishable by up to six months in county jail and up to a $1,000 fine. However, because Andrade had been convicted of several prior offenses -- all non-violent -- his petty thefts were first enhanced to felonies under California Penal Code § 666, and then enhanced again to third and fourth strikes under California's Three Strikes and You're Out Law, California Penal Code §§ 667 and 1170.12 ("the Three Strikes law"). As a result, Andrade, a non-violent recidivist who twice shoplifted merchandise worth a total of $153.54, received a life sentence in prison with no possibility of parole for 50 years.

In this appeal from the denial of his habeas petition under 28 U.S.C. § 2254, Andrade argues that his sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment. Four justices of the United States Supreme Court

have agreed that the "unique quirk " in California's Three Strikes law that permits misdemeanor conduct to be punished with severe indeterminate sentences raises a substantial Eighth Amendment question. *Riggs v. California*, 525 U.S. 1114, 119 S. Ct. 890 (1999) (memorandum opinion by Justice Stevens, joined by Justices Souter and Ginsburg respecting the denial of the petition for writ of certiorari).[1]

We hold that the California Court of Appeal unreasonably applied clearly established United States Supreme Court precedent when it held, on Andrade's direct appeal, that his sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Our decision does not invalidate California's Three Strikes law generally. Rather, we conclude that it is un-constitutional only as applied to Andrade because it imposes a sentence grossly disproportionate to his crimes.

I. BACKGROUND

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1. *Riggs* concerned an Eighth Amendment challenge by a recidivist defendant sentenced to 25 years to life after stealing a bottle of vitamins from a supermarket. 525 U.S. 1114, 119 S. Ct. at 891. Riggs was convicted of petty theft with a prior (Cal. Penal Code § 666), which counted as his "third-strike" offense under California's Three Strikes law. The California Court of Appeal affirmed Riggs' sentence, and the California Supreme Court denied his petition for review. In his memorandum opinion, Justice Stevens, joined by Justices Souter and Ginsburg, noted that the Eighth Amendment issue presented was "obviously substantial, particularly since California appears to be the only State in which a misdemeanor could receive such a severe sentence." *Id.* Nevertheless, he concluded that the issue should first be addressed by a lower federal court or the California Supreme Court, stating that Riggs could assert his claim in a petition for a writ of habeas corpus "since [he] is asking us to apply a settled rule of Eighth Amendment law." *Id.* at 892. Justice Breyer wrote separately, agreeing with Justice Stevens that Riggs raised a"serious question" but dissenting from the denial of certiorari. *Id.*

A. California's Three Strikes Law

California's Three Strikes law consists of a pair of substantively identical statutes both enacted in 1994, one by the California Legislature, Stats.1994, ch. 12, § 1, adding California Penal Code § 667(b)-(i), and one by a ballot initiative, Proposition184, § 1, as approved by voters, Gen. Elec. (Nov. 8, 1994), adding California Penal Code § 1170.12. *See generally In re Cervera*, 16 P.3d 176, 177 (Cal. 2001).

The purpose of the law is to impose longer terms of imprisonment on defendants with prior qualifying felony convictions or "strikes." *Id.* at 179. Under the law, only "serious" or "violent" felonies, as defined in California Penal Code § 1192.7(c) and § 667.5(c) respectively, qualify as prior strikes. Cal. Penal Code §§ 667(d)(1), 1170.12(b)(1). The"triggering" (i.e., principal) offense, however, may be *any felony* under California law. *Cervera*, 16 P.3d at 177 ("the Three Strikes law governs when a defendant is convicted of a felony or `strike' *of any kind*") (emphasis added). This includes a so-called "wobbler" offense (which can be either a misdemeanor or felony) when charged and sentenced as a felony. *People v. Terry*, 54 Cal. Rptr. 2d 769, 770-71 (Ct. App. 1996) (holding that the wobbler offense of petty theft with a prior, when charged and sentenced as a felony, may count as a third strike).

Under the "second-strike" provision of the Three Strikes law, when a defendant with one prior strike is convicted of *any felony*, the sentencing court must impose a sentence twice as long as the sentence the defendant would have otherwise received. Cal. Penal Code §§ 667(e)(1), 1170.12(c)(1); *Cervera*, 16 P.3d at 177. When a defendant with two prior strikes is convicted of *any felony*, the "third-strike" provision mandates a sentence of at least 25 years to life (i.e., an indeterminate life sentence with eligibility for parole after serving no fewer than 25 years). Cal. Penal Code §§ 667(e)(2)(A), 1170.12(c)(2)(A).

In addition to the fact that the triggering felony need not be

"serious" or "violent," several other features of California's Three Strikes law combine to make it particularly severe. First, a defendant may be considered to have two prior strikes even though he was convicted of both qualifying offenses in a single judicial proceeding. *People v. Askey*, 56 Cal. Rptr. 2d 782, 785 (Ct. App. 1996). Second, prior strikes need not be violent offenses as long as they qualify as "serious" (e.g., a residential burglary where the burglar was unarmed and residents were not home would be considered a prior strike). Cal. Penal Code §§ 1192.7(c)(18), 460(a). Third,"serious" or "violent" felony convictions imposed prior to the law's enactment in 1994 can be charged as strikes, *People v. Kinsey*, 47 Cal. Rptr. 2d 769, 775 (Ct. App. 1995), as may a defendant's equivalent convictions received in another jurisdiction, California Penal Code §§ 667(d)(2), 1170.12(b)(2), and certain convictions a defendant received as a juvenile, California Penal Code §§ 667(d)(3), 1170.12(b)(3). Fourth, there is no "washout" period after which prior qualifying convictions will no longer be counted as strikes.[2] *People v. Martinez*, 84 Cal. Rptr. 2d 638, 646 & n.9 (Ct. App. 1999) (citing Cal. Penal Code § 1170.12(a)(3)). Fifth, defendants with prior strikes who are convicted of current multiple felonies committed on different occasions must serve consecutive sentences. Cal. Penal Code §§ 667(c)(6), 1170.12(a)(6); *People v. Ingram*, 48 Cal. Rptr. 2d 256, 264 (Ct. App. 1995) ("Since each felony count of which a defendant currently stands convicted arises from separate residential burglaries, the mandatory minimum term of 25 years to life must be imposed consecutively for each count, for a minimum . . . term of 50 years."), disapproved on other grounds by *People v. Dotson*, 941 P.2d 56, 63 (Cal. 1997). Finally, a defendant sentenced to an indeterminate life sentence will not be eligible for parole until he has served his entire mandatory minimum

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2. The California Supreme Court has held, however, that judges have reviewable discretion to not consider, in the interest of justice, an otherwise qualifying conviction as a strike. *People v. Superior Court (Romero)*, 917 P.2d 628, 647 (Cal. 1996).

term. *Cervera*,16 P.3d at 181 (holding that a third-strike defendant's mandatory minimum term of 25 years may not be reduced with good-time credits).

B. Facts And Procedural History

According to the probation officer's presentence report, Andrade is a longtime heroin addict with a history of convictions for non-violent offenses. The report indicates that Andrade was convicted in 1982 of a misdemeanor theft offense, for which he served six days in county jail and received twelve months of probation.[3] In 1983, Andrade pled guilty in a consolidated proceeding to three counts of first degree burglary (residential burglary) in violation of California Penal Code § 459.[4] In 1988, Andrade was convicted in federal court of "transportation of marijuana, " a felony. In 1990, Andrade was convicted in state court for a petty theft offense. Later that year, he was again convicted in federal court of another felony charge of "transportation of marijuana." Finally, in 1991, Andrade received a parole violation for escape from federal prison.[5] All

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3. Without explanation, the State excludes Andrade's 1982 misdemeanor conviction in its recounting of his criminal history. We include it here because it appears in the presentence report upon which the sentencing court presumably relied. The report also shows that Andrade was sentenced to drug diversion at the same time as this misdemeanor conviction.

4. The presentence report indicates that Andrade pled guilty to six, not three, counts of first-degree burglary. Both the trial court and the state court of appeal, as well as the State in its briefs, however, indicated that Andrade had been convicted of only three burglaries. We assume likewise.

5. The presentence report indicates that Andrade was sentenced to eight years for his 1988 federal conviction and 2,191 days (six years) for his 1990 federal conviction. It appears from the report, however, that Andrade served less than one and one-half years for the 1988 conviction and less than two and one-half years for the

told, Andrade had been convicted of five felonies and two misdemeanors--all non-violent--prior to his current convictions.

On November 4, 1995, Andrade exited a K-Mart store with five videotapes, worth $84.70, stuffed inside his pants. Two weeks later, he shoplifted another four videotapes, worth $68.84, from a different K-Mart store. In both instances, store personnel stopped Andrade as he exited the store and recovered the merchandise.

California classifies both of these offenses as petty theft, a misdemeanor punishable by up to six months in county jail and up to a $1,000 fine. Cal. Penal Code § 490; see also Cal. Penal Code § 487 (defining grand theft as theft over $400). Because Andrade had a previous misdemeanor theft conviction in 1990, however, his shoplifting offenses were charged as two counts of petty theft with a prior, pursuant to California Penal Code § 666. Petty theft with a prior is a so-called "wobbler" offense, punishable either as a misdemeanor with up to one year in county jail or as a felony with up to three years in state prison. Cal. Penal Code § 666 ("punishable by imprisonment in the county jail not exceeding one year, or in the state prison"); Cal. Penal Code § 18 (specifying sentences of "16 months, or two or three years" for any crime "punishable by imprisonment in a state prison" where no other penalty is specified by law); *Terry*, 54 Cal. Rptr. 2d at 770-71. Prosecutors have discretion to charge petty theft with a prior as either a misdemeanor or a felony, and the trial court has reviewable discretion to reduce this charge to a misdemeanor at the time of sentencing. *People v. Superior Court (Alvarez)*, 928 P.2d 1171 (Cal. 1997) (holding that a trial court's discretion under Cal. Penal Code § 17(b) to reduce a"wobbler" offense is not eliminated by the Three Strikes law but is reviewable).

1990 conviction. The report offers no explanation for this nor does it provide any further details about these offenses.

In Andrade's case, the prosecutor elected to charge his two petty thefts with a prior as felonies, thereby implicating the Three Strikes law. Andrade's three 1983 burglary convictions were charged as his first two strikes. His petty thefts were charged as his third and fourth strikes.

The trial court bifurcated Andrade's trial. In the first proceeding, the jury found him guilty of two counts of petty theft with a prior under California Penal Code § 666. Before the jury's verdict, the court denied Andrade's motions to reduce the charges to misdemeanors and to strike the prior convictions. In the second proceeding, the same jury found that he had been convicted of three counts of first degree residential burglary on April 26, 1983. On April 24, 1996, the court sentenced Andrade to 25 years to life for each petty theft with a prior conviction, to be served consecutively as required by the Three Strikes law. Cal. Penal Code §§ 667(c)(6),1170.12(a)(6). Andrade will not become eligible for parole until 2046, after serving 50 years; he will be 87 years old.

Andrade appealed to the California Court of Appeal, which affirmed his conviction and sentence on May 13, 1997. In an unpublished opinion, the court rejected, among other arguments, Andrade's claim that his sentence was cruel and unusual under the Eighth Amendment. The California Supreme Court denied Andrade's petition for review without comment.

Subsequently, Andrade filed a timely pro se petition for a writ of habeas corpus in federal district court under 28 U.S.C.§ 2254. He raised several constitutional issues, including violation of his Eighth Amendment right. The district court denied his petition in a two-sentence order adopting the magistrate judge's Report and Re-commendation which stated that "the state court['s] conclusions . . . were reasonable applications of federal law." The district court entered judgment on February 19, 1999.

On March 17, 1999 (25 days later), Andrade deposited in

the prison mail system a Motion for Order Extending Time for Appeal, in which he requested a 60-day extension of time to file his notice of appeal. In a supporting declaration, Andrade explained that he needed the extra time to conduct research in the prison library, to which he was permitted access for only two hours each Friday and Saturday.

In a memorandum order, the district court denied Andrade's motion, stating in relevant part:

> In his Motion, petitioner claims that he has been denied adequate access to the prison law library to prepare his notice of appeal. [citation omitted] This court is not persuaded by petitioner's argument. He has not met the standard under Fed. R. App. P.4(a)(5) to warrant an extension of time. Accordingly, petitioner's Motion is denied.

On April 11, 1999 (50 days after the district court entered its judgment), Andrade deposited a Notice of Appeal in the prison mail system. Subsequently, the district court entered an order denying Andrade a certificate of appealability.

We granted Andrade a certificate of appealability to raise his Eighth Amendment claim. Although Andrade initially filed his appeal pro se, we appointed counsel and ordered supplemental briefing.

II. JURISDICTION

We must consider as a threshold matter whether we have jurisdiction over this appeal. A timely notice of appeal is mandatory and jurisdictional. Fed. R. App. P. 3(a); *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 264 (1978); *Vahan v. Shalala*, 30 F.3d 102, 103 (9th Cir. 1994). Rule 4(a)(1)(A) requires that a notice of appeal be filed within 30 days after the district court enters judgment where, as here, the United States is not a party. The district court may extend this period if "(i) a

party so moves no later than 30 days after the time prescribed by [ ] Rule 4(a)[(1)] expires" and "(ii) that party shows excusable neglect or good cause." Fed. R. App. P. 4(a)(5)(A); see also *Vahan*, 30 F.3d at 103. Such an extension, however, is limited to 30 days after the time prescribed by Rule 4(a)(1) or 10 days after the district court order granting the party's motion, whichever is later. Fed. R. App. P. 4(a)(5)(C).

Andrade did not file a notice of appeal until April 11, 1999, 50 days after the district court entered judgment. He did file, however, pursuant to Rule 4(a)(5)(A), a motion for extension of time on March 17, within 30 days of entry of the district court judgment.[6] Although the district court denied the motion, Andrade asserts that his motion for extension of time was the functional equivalent of a notice of appeal. We agree.

We have previously held that a motion for extension of time may not be construed as a notice of appeal. *Selph v. Council of City of Los Angeles*, 593 F.2d 881, 883 (9th Cir.1979), *overruled on other grounds by United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265 (9th Cir. 1985). In so deciding, we distinguished the case from "those few criminal appeals or collateral attacks on criminal convictions . . . in which extraordinary relief has been granted." *Id.* (citing *United States v. Hoye*, 548 F.2d 1271, 1273 (6th Cir. 1977) (treating a motion for enlargement of time containing "most of the

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6. In its order denying Andrade's request for an extension of time, the district court mistakenly used March 25, 1999 as the date Andrade filed his motion. The clerk's stamp on Andrade's motion indicates that the district court received his motion on March 18. Moreover, a notice of appeal by an inmate confined in an institution will be considered timely if it is deposited in the institution's internal mail system with proper postage on or before the last day of filing. Fed. R. App. P. 4(c)(1); *see also Houston v. Lack*, 487 U.S. 266, 276 (1988). Andrade's supporting declaration indicates that he accomplished this task on March 17.

essential facts required of a notice of appeal" as a timely notice of appeal)). The present appeal is distinguishable from *Selph* in two ways: (1) unlike the appellants in *Selph*, Andrade was proceeding pro se at the time he filed his motion for extension of time; and (2) Andrade's suit is a collateral attack on his criminal conviction.

More importantly, we must reexamine our holding in *Selph* in light of the Supreme Court's decision in *Smith v. Barry*, 502 U.S. 244 (1992). In *Smith*, the Supreme Court held that a document intended to serve as an appellate brief may qualify as the notice of appeal required by Rule 3. *Id.* at 248-49. The Court stated:

> While a notice of appeal must specifically indicate the litigant's intent to seek appellate review, the purpose of this requirement is to ensure that the filing provides sufficient notice to other parties and the courts. Thus, the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal. If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.

Id. (internal citations omitted). The Court also noted that Rule 3's requirements should be liberally construed, although noncompliance will still be fatal to an appeal. *Id.* at 248.

Two of our sister circuits have relied on *Smith v. Barry* to hold that a timely motion for extension of time may qualify as a notice of appeal. *United States v. Smith*, 182 F.3d 733, 735-36 (10th Cir. 1999); *Listenbee v. City of Milwaukee*, 976F.2d 348, 349-51 (7th Cir. 1992).[7] Prior to the Supreme Court's decision

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7. Prior to the Supreme Court's decision in *Smith v. Barry*, the Sixth Circuit had already held that a timely motion for extension of time may be treated as a notice of appeal, at least in cases involving a direct or collateral appeal from a criminal conviction. *United States v. Christoph*, 904 F.2d 1036, 1040 (6th Cir. 1990), *superceded by statute on other grounds, as recognized in United States v. Williams*, 940 F.2d 176, 181 n.3 (6th Cir. 1991); *Hoye*, 548 F.2d at 1273.

in *Smith v. Barry*, the Tenth Circuit had held to the contrary. *Longstreth v. City of Tulsa*, 948 F.2d 1193, 1194 (10th Cir. 1991) ("[A]sking for more time in which to file an appeal indicates uncertainty as to whether one will file an appeal and compels the conclusion that the notice of appeal is something yet to be filed."). In *United States v. Smith*, however, the Tenth Circuit departed from its previous rule by explaining that *Smith v. Barry* had modified the intent requirement by shifting the emphasis to "`the notice afforded by a document, not the litigant's motivation in filing it. . . .' " 182 F.3d at 735 (quoting *Smith v. Barry*, 502 U.S. at 248-49). It explained that the relevant question is whether a motion gave notice of the three elements required by Rule 3: "`the party or parties taking the appeal by naming each one in the caption or body of the notice'; `the judgment, order or part thereof appealed from'; and the `court to which the appeal is taken.' " *Id.* (quoting Rule 3(c)(1)). The court concluded by holding that the appellant's "Motion for Out of Time Notice of Appeal" satisfied these elements, was filed within the allowable time, and thus was the functional equivalent of a notice of appeal. *Id.* at 735-36[8]

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8. The Eleventh Circuit has concluded otherwise. After *Smith v. Barry*, it held that a motion for extension of time cannot be the functional equivalent of a notice of appeal unless "it is objectively clear [from the motion] that a party intends to appeal." *Compare Rinaldo v. Corbett*, 256 F.3d 1276, 1279-80 (11th Cir. 2001) (holding that a motion for extension of time is the functional equivalent of a notice of appeal where the party "specifically states that `Plaintiff . . . gives Court notice that he intends to appeal' "), *with Harris v. Ballard*, 158 F.3d 1164 (11th Cir. 1998) (holding that a motion for extension of time is not the functional equivalent of a notice of appeal

[1]We find the Tenth Circuit's reasoning persuasive and join it, along with the Sixth and Seventh Circuits, in holding that a timely motion for extension of time to file a notice of appeal may be considered the functional equivalent of a notice of appeal provided it gives notice of the three elements required by Rule 3(c)(1). Andrade's declaration in support of his motion for extension of time states: "Leandro Andrade respectfully requests . . . an additional 60 days in which to file his notice of appeal." While this language does not preclude the possibility that Andrade may have elected not to appeal, we conclude that to require more explicit language conflicts with the Supreme Court's instruction that we liberally construe Rule 3's requirements. *Smith v. Barry*, 502 U.S. at 248. Andrade's motion for extension of time satisfied the three notice requirements of Rule 3(c)(1): it identified the judgment at issue, it specified the court to which the appeal would be taken, and it was delivered to both the district court and the opposing party. Moreover, Andrade filed it within 30 days of the entry of the district court judgment, thus satisfying the timeliness requirements of Rule 4(a)(1)(A). Because we conclude that Andrade's motion is the functional equivalent of a timely notice of appeal, we have jurisdiction to review this appeal. To the extent that our decision in *Selph* dictates otherwise, it is overruled in light of the Supreme Court's decision in *Smith v. Barry*, 502 U.S. 244. *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992) (noting that a three-judge panel may overrule the decision of a prior panel "'when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point'") (quoting *United States v. Lancellotti*, 761 F.2d

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where there is uncertainty as to whether the party will in fact appeal). *See also Haugen v. Nassau County Dep't of Soc. Servs.*, 171 F.3d 136, 138 (2d Cir. 1999) (holding that a motion for extension of time is the functional equivalent of a notice of appeal where appellants stated they "will appeal" the judgment).

1363,1366 (9th Cir. 1985)).[9]

III. STANDARD OF REVIEW

We review de novo a district court's decision to grant or deny a 28 U.S.C. § 2254 habeas petition. *Bribiesca v. Galaza*, 215 F.3d 1015, 1018 (9th Cir. 2000).

Because Andrade filed his petition on August 19, 1998, we review his petition under the provisions of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) ("AEDPA"). *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir. 2000). "Under AEDPA, we may reverse a state court's decision denying relief only if that decision is 'contrary to, or involves an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States.' " *Id.* at 1149 (quoting 28 U.S.C. § 2254(d)(1)).

We determine de novo what is "clearly established federal law, as determined by the Supreme Court of the United States." *LaJoie v. Thompson*, 217 F.3d 663, 668 (9th Cir. 2000) (internal citation and quotation marks omitted). If the federal law is not clearly established at the time of the state court determination, § 2254(d)(1) bars relief. *Vasquez v. Strack*, 228 F.3d 143, 148-49 (2d Cir. 2000), *cert. denied*, 128 S.Ct. 1128 (2001).

Justice O'Connor addressed the distinction between the "contrary to" and "an unreasonable application of" provisions of § 2254(d)(1) in *Williams v. Taylor*, 529 U.S. 362, 405-09 (2000). In *Van Tran*, we summarized her analysis:

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9. Because we find that Andrade's motion for extension of time was the functional equivalent of a timely notice of appeal, we need not address his argument that the district court abused its discretion by denying his motion for extension of time without a proper analysis of excusable neglect.

> A state court's decision can be "contrary to" federal law either 1) if it fails to apply the correct controlling authority, or 2) if it applies the controlling authority to a case involving facts "materially indistinguishable" from those in a controlling case, but nonetheless reaches a different result. A state court's decision can involve an "unreasonable application" of federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable.

212 F.3d at 1150 (internal citation omitted). We noted that the two concepts overlap and that it sometimes will be necessary to apply both standards. *Id.*

"[W]hen analyzing a claim that there has been an unreasonable application of federal law, we must first consider whether the state court erred; only after we have made that determination may we then consider whether any error involved an unreasonable application of controlling law within the meaning of § 2254(d)." *Id.* at 1155. We will find an "unreasonable application" only when our independent review of the legal question "leaves us with a `firm conviction' that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous -- in other words that clear error occurred." *Id.* at 1153-54.

IV. EIGHTH AMENDMENT

[2] The Eighth Amendment to the United States Constitution provides that there "shall not be . . . cruel and unusual punishments inflicted."[10] At issue here is whether this amend

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10. The Eighth Amendment "applies against the States by virtue of the Fourteenth Amendment." *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991) (opinion of Justice Scalia, joined by Chief Justice Rehnquist) (citing *Robinson v. California*, 370 U.S. 660 (1962)).

ment proscribes a sentence of 50 years to life for two shoplifting offenses involving nine videotapes worth a total of $153.54 by a defendant with several previous convictions for non-violent offenses. The California Court of Appeal, in its 1997 decision affirming Andrade's conviction, concluded that it did not.

The constitutionality of life sentences for non-violent recidivists is controlled by several decisions rendered by the Supreme Court in the two decades prior to the state court's decision. In *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court upheld a sentence of life in prison *with* the possibility of parole for a three-time non-violent felony recidivist. Three years later, in *Solem v. Helm*, 463 U.S. 277 (1983), the Court reversed a sentence of life in prison *without* the possibility of parole for a seven-time non-violent felony recidivist. Finally, in *Harmelin v. Michigan*, 501 U.S. 957 (1991), a decision without a majority opinion, Justice Kennedy, writing for himself and two other justices, reconciled the Court's prior decisions in *Rummel* and *Solem* and articulated a revised test. Under this test, the "Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are `grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S. at 288, 303). Our circuit and others regard Justice Kennedy's test as "the rule of *Harmelin*" because it is the "position taken by those Members who concurred in the judgment[ ] on the narrowest grounds. . . ." *United States v. Bland*, 961 F.2d 123, 128-29 (9th Cir.1992) (internal citation and quotation marks omitted); *see also Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001) ("Since *Harmelin*, our courts and others have applied the principles outlined in Mr. Justice Kennedy's opinion to [Eighth Amendment] cases . . . ."); *United States v.*

Jones, 213 F.3d 1253, 1261 (10th Cir. 2000) ("We have ruled that Justice Kennedy's plurality opinion . . . sets forth the applicable Eighth Amendment test."); *United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998) ("Our court follows the narrow proportionality rule established by Justice Kennedy's concurrence in *Harmelin* . . . .").

A. Review of Supreme Court Case Law

Understanding the test articulated by Justice Kennedy's concurrence requires that we first review the Court's decisions in *Rummel* and *Solem*.

In *Rummel*, the Supreme Court upheld a sentence of life imprisonment *with* the possibility of parole for a three-time non-violent felony recidivist. Rummel was sentenced under a Texas recidivist statute which provided that "[w]hoever shall have been three times convicted of a felony less than capital shall on the third conviction be imprisoned for life in the penitentiary." *Rummel*, 445 U.S. at 264 (citing Tex. Penal Code Ann. § 12.42(d) (1974)). Rummel's two prior felonies were (1) a 1964 conviction for fraudulent use of a credit card to obtain $80 worth of goods or services;[11] and (2) a 1969 conviction for passing a forged check for $28.36.[12] In 1973, Rummel received his third conviction for obtaining $120.75 by false pretenses, an offense normally punishable by imprisonment for two to ten years. Because Rummel had two prior felony convictions, however, the prosecution elected to proceed under the recidivist statute, which carried a life sentence. *Id.* at 266.

Several factors influenced the Court's holding that

11. This was a felony because it involved an amount of more than $50. The offense was punishable by a sentence of two to ten years in prison. Rummel was sentenced to three years. *Id.* at 265.

12. This was a felony punishable by two to five years in prison. Rummel was sentenced to four years. *Id.* at 265-66.

Rummel's sentence did not violate the Eighth Amendment. First, the Court emphasized that the Texas statute required separate convictions and terms of imprisonment for each felony, such that a defendant must twice be convicted and twice serve time in prison before being eligible for a life sentence on his third conviction. *Id.* at 278. Second, the Court noted that it could not ignore the fact that under Texas' liberal parole policy Rummel would be eligible for parole in as few as twelve years. *Id.* at 280-81. Third, the Court stressed that prosecutors retained discretion to plea bargain or not invoke the recidivist statute "so as to screen out truly `petty' offenders who fall within the literal terms of" the statute. *Id.* at 281.

In *Solem*, the Supreme Court affirmed a decision of the Eighth Circuit holding unconstitutional a sentence of life imprisonment *without* the possibility of parole for a seven-time non-violent felony recidivist. The defendant Helm was sentenced under a South Dakota recidivist statute that provided for a maximum penalty of life imprisonment without parole and a $25,000 fine for a defendant who had "at least three prior convictions [*sic*] in addition to the principal felony." 463 U.S. at 281 (citing S.D. Codified Laws § 22-7-8 (1979)) (alteration in original). Helm had six prior felonies: three convictions for third-degree burglary, one in 1964, another in 1966, and the third in 1969;[13] a fourth conviction in 1972 for obtaining money under false pretenses; [14] a fifth conviction in 1973 for grand larceny;[15] and a sixth conviction in 1975 for third-offense

13. Third-degree burglary was punishable by up to fifteen years in the state penitentiary. *Id.* at 280 n.1.

14. Obtaining money under false pretenses was punishable by up to three years in the state penitentiary. *Id.* at 280 n.2.

15. Grand larceny was defined as the taking of property of a value exceeding $50, taking property of a value less than $50 from the person of another, or taking livestock. It was punishable by up to ten years in the state penitentiary. *Id.* at 280 n.3.

driving while intoxicated. *Id.* at 279-80. In 1979, when Helm was convicted of his seventh felony for uttering a "no account" check for $100, the county prosecutor sought a life sentence under the state's recidivist statute. *Id.* at 281. Ordinarily, the maximum punishment for this felony would have been five years in the state penitentiary and a $5,000 fine, but under South Dakota's recidivist statute, Helm was sentenced to life in prison without the possibility of parole. *Id.*

[3] The Court held that proportionality analysis under the Eighth Amendment applied to terms of imprisonment just as it applied to capital sentences and fines, although it noted that successful challenges to the former would be "'exceedingly rare.'" *Id.* at 289-90 (citing *Rummel*, 445 U.S. at 272). The Court emphasized that legislatures' "broad authority" to determine appropriate punishments was entitled to "substantial deference." *Id.* at 290. At the same time, no penalty was per se constitutional under the Eighth Amendment. *Id.* The Court stated that "no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment." *Id.* at 291 n.17. Instead, it established three objective criteria to guide proportionality analysis under the Eighth Amendment: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292.[16]

Applying the three criteria, the Court concluded that Helm's sentence was grossly disproportionate to his crime of

16. In evaluating the seriousness of the underlying crime, the *Solem* Court noted that some norms are easily applied, such as non-violent crimes are less serious than violent crimes, the more that is stolen the more serious the offense, lessor included offenses are less serious than the greater offense, and attempts and accessories are less culpable than actual commissions and principals. *Id.* at 292-93.

uttering a "no account" check for $100, even in light of his prior six non-violent felony convictions.[17] *Id.* at 289-90, 303. The Court emphasized that Helm's life sentence "[wa]s far more severe than the life sentence we considered in *Rummel*" because Rummel was likely eligible for parole in 12 years while Helm was given no possibility of parole at all. *Id.* at 297.[18]

In 1991, the Supreme Court revisited *Solem* and *Rummel* in *Harmelin*, a case involving a defendant's Eighth Amendment challenge to his mandatory sentence under Michigan's drug laws of life in prison *without* the possibility of parole for possession of more than 650 grams of cocaine, his first felony offense. *Harmelin*, 501 U.S. at 961. The Court upheld Harmelin's sentence with five justices agreeing that it did not violate the Eighth Amendment, although for different reasons. Justice Scalia, joined only by Chief Justice Rehnquist, concluded that the decision in *Solem* was "simply wrong: the Eighth Amendment contains no proportionality guarantee." *Id.* at 965. Justice Kennedy, joined by Justices O'Connor and Souter, stated that a non-capital sentence could violate the Eighth Amendment if it was grossly disproportionate to the crime but that *Harmelin* did not meet this standard. *Id.* at 996-1009. Justices White,

17. Justice Powell's majority opinion in *Solem* used "grossly disproportionate" and "significantly disproportionate" interchangeably. *See, e.g., id.*, at 284, 288, 291 n.17 (using "grossly disproportionate") and at 303 (using "significantly disproportionate"). Justice Kennedy's concurrence in *Harmelin* cited *Solem*, 463 U.S. at 288, 303, for the "grossly disproportionate "standard. 501 U.S. at 1001.

18. The Court rejected the State's argument that it should consider the possibility that the governor could commute Helm's sentence to a term of years because while parole was a "regular part of the rehabilitative process," commutation was an "ad hoc exercise of executive clemency" *id.* at 300-03.

Blackmun, Stevens, and Marshall dissented, arguing that the Court should not depart from the three-factor test articulated in *Solem* and that a life sentence without parole was unconstitutionally disproportionate to Harmelin's crime. *Id.* at 1009-29.

Although the Court did not produce a majority opinion, seven justices favored some manner of proportionality review. As noted earlier, we and other circuits treat the test articulated by Justice Kennedy as "the rule of *Harmelin* ." *Bland*, 961 F.2d at 129 (internal citation and quotation marks omitted); *see also Henderson*, 258 F.3d at 709; *Jones*, 213 F.3d at 1261; *Harris*, 154 F.3d at 1084.

Justice Kennedy's concurrence did not challenge the central holding of *Solem* that a grossly disproportionate sentence of imprisonment violates the Eighth Amendment. *Harmelin*, 501 U.S. at 1001 (citing *Solem*, 463 U.S. at 288, 303). Nor did Justice Kennedy question the *Solem* majority's conclusion that Solem's sentence of life imprisonment without the possibility of parole for uttering a no account check was grossly disproportionate, given the "`relatively minor'" nature of Solem's offenses. *Id.* at 1002 (quoting *Solem*, 463 U.S. at 296-97). Rather, Justice Kennedy emphasized several points also made by the *Solem* majority. *Id.* at 998 (stating that "close analysis of our decisions [in *Rummel* and *Solem*] yields some common principles that give content to the uses and limits of proportionality review"). These principles include the following: (1) courts should accord "substantial deference" to legislative determinations of appropriate punishments, *id.* at 998-99 (citing *Solem*, 463 U.S. at 290); (2) the Eighth Amendment does not require that legislatures adopt any particular penological theory, *id.* at 999, a point implicit in the *Solem* Court's conclusion that legislatures are entitled to "substantial deference;" (3) divergences in theories of sentencing and the length of prison terms are "inevitable" in our federalist system, *id.* at 999 (citing *Solem*, 463 U.S. at 291 n.17); (4) proportionality reviews should be informed by

objective factors, *id.* at 1000 (citing *Solem*, 463 U.S. at 290); and (5) "the Eighth Amendment does not require strict proportionality between crime and sentence" but "[r]ather, it forbids only extreme sentences that are `grossly disproportionate' to the crime," *id.* at 1001 (citing *Solem*, 463 U.S. at 288, 303). Relying on these "common principles," Justice Kennedy concluded that courts need not examine the second and third factors specified in *Solem* – the intrajurisdictional and interjurisdictional reviews -- unless a "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* at 1005. While Justice White in his *Harmelin* dissent considered this "an abandonment of the second and third factors set forth in *Solem*," *id.* at 1020, Justice Kennedy argued that it was consistent with the *Solem* Court's "admonition that `a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate,' "*id.* at 1004 (citing *Solem*, 463 U.S. at 290 n.16).

The means by which Justice Kennedy decided that Harmelin's sentence did not violate the Eighth Amendment demonstrates the conformity between his proportionality analysis and that articulated by the *Solem* Court. Rather than emphasizing a different analytical framework, Justice Kennedy based his analysis on the more serious nature of Harmelin's offense. Justice Kennedy stressed that Harmelin's offense "threatened to cause grave harm to society" unlike "the relatively minor, nonviolent crime at issue in *Solem* ."*Id.* at 1002. Justice Kennedy further noted that the "[p]ossession, use, and distribution of illegal drugs represent `one of the greatest problems affecting the health and welfare of our population' " and that the quantity of cocaine that Harmelin possessed had "a potential yield of between 32,500 and 65,000 doses." *Id.* at 1002 (internal citations omitted). Thus, in concluding that Harmelin's sentence did not raise an inference of gross disproportionality, Justice Kennedy did not suggest, implicitly or explicitly, that his analysis would have led to a different outcome in *Solem*.

Accordingly, we conclude that *Solem* remains good law after *Harmelin*, recognizing that we need not consider *Solem*'s second and third factors if we conclude under the first factor that a defendant's sentence does not raise an inference of gross disproportionality to the crime. *Id.* at 1005 ("This conclusion neither `eviscerate[s]' *Solem*, nor `abandon[s]' its second and third factors, as the dissent charges . . . ."). *See also Henderson*, 258 F.3d 706 (citing *Solem* throughout the opinion for binding points of law).

B. Application of Supreme Court Case Law

Following the revised three-factor test, we first compare Andrade's punishment to his crimes. Because this comparison leads to an "inference of gross disproportionality," we then proceed to compare Andrade's sentence to sentences imposed for other crimes in California and then to sentences imposed for similar crimes in other jurisdictions.

1. *Comparison of Punishment and Crime*

a. Harshness of the Penalty

Andrade was sentenced to two consecutive indeterminate sentences of 25 years to life in prison. Because of a unique feature of the Three Strikes law, the sentencing judge had no discretion to impose the sentences concurrently. Cal. Penal Code §§ 667(c)(6), 1170.12(a)(6); *Ingram* , 48 Cal. Rptr. 2d at 264. [19] Unlike most sentences imposed under California's

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19. The dissent stresses the fact that Andrade's sentence is for two offenses rather than one. There is no dispute that Andrade was convicted of two petty theft offenses with a prior. However, as noted above, California's Three Strikes law precluded the trial judge from exercising any sentencing discretion; the court was required to impose consecutive sentences. The cases cited by the dissent are distinguishable, as it does not appear in these cases that the

sentencing laws, Andrade's minimum three-strikes term may not be reduced by credit for good behavior or working while in prison. *Cervera*, 16 P.3d at 181. Andrade therefore must serve a minimum of 50 years in prison before he is eligible for parole.

The unavailability of parole for a half century makes Andrade's sentence substantially more severe than the life sentence at issue in *Rummel*. There, Rummel was eligible for parole in as few as 12 years. In contrast, Andrade must serve more than four times the length of Rummel's sentence before he becomes eligible for parole. *See also Smallwood v. Johnson*, 73 F.3d 1343, 1346, 1352 (5th Cir. 1996) (upholding a 50-year sentence for a non-violent recidivist only after noting that the defendant would be eligible for parole within 12 years); *Hawkins*, 200 F.3d at 1284 (stating that the availability of parole is relevant to determining whether the length of the sentence violates the Eighth Amendment).

Indeed, Andrade's sentence is the functional equivalent of the sentences at issue in *Solem* and *Harmelin* – life in prison without the possibility of parole. A "life sentence without parole is the second most severe penalty permitted by law," *Harmelin*, 501 U.S. at 1001, and is the same sentence that the Supreme Court held unconstitutional when imposed on a seven-time felony recidivist in *Solem*. Andrade was 37 years old at the time of his sentencing and will be 87 years old when he is first eligible for parole. The life expectancy of a 37-year-old American male is 77 years. National Center for Health

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sentencing judge or official was required to impose consecutive sentences. *Hawkins v. Hargett*, 200 F.3d 1279, 1280 (10th Cir. 1999) ("The trial judge ordered that the[ ] sentences be served consecutively . . ."); *United States v. Aiello*, 864 F.2d 257, 262 (2d Cir.1988) ("The district court did not abuse its substantial discretion in choosing an appropriate sentence."); *see also Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001) (explaining that the Superintendent imposed consecutive" sentences" denying yard privileges to a prisoner, a sanction "authorized by state law").

Statistics, Center for Disease Control and Prevention, *National Vital Statics Reports* at Table 2, Vol. 47, No. 28 (Dec. 13, 1999). It is thus more likely than not that Andrade will spend the remainder of his life in prison without ever becoming eligible for parole.

b. Gravity of the Offense

As *Harmelin* makes clear, simply because a sentence is harsh does not mean that it is disproportionate to the crime. We examine the punishment in light of the gravity of the offense. We also recognize that a "State is justified in punishing a recidivist more severely than it punishes a first offender." *Solem*, 463 U.S. at 296. But "the enhanced punishment imposed for the [present] offense `is not to be viewed as . . . [an] additional penalty for the earlier crimes,' but instead as `a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" *Witte v. United States*, 515 U.S. 389, 400 (1995) (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948)); *see also Solem*, 463 U.S. at 297 n.21 ("We must focus on the principal felony -- the felony that triggers the life sentence -- since [the defendant] already has paid the penalty for each of his prior offenses. But we recognize, of course, that [the defendant]'s prior convictions are relevant to the sentencing decision.").

Andrade's present convictions are for two counts of petty theft with a prior for shoplifting videotapes on two different occasions with a total value of $153.54. Petty theft is similar in many respects to the defendant's crime of "uttering a no account check" in *Solem*. Both "involve[ ] neither violence nor [the] threat of violence to any person " and a relatively small amount of money. *Id.* at 296. Additionally, both are easily distinguished from the defendant's crime in *Harmelin*, where Justice Kennedy emphasized the serious and often violent consequences of drug use and distribution and noted that Harmelin possessed enough cocaine for between 32,500 and 65,000 doses. *Harmelin*, 501 U.S. at 1002. Justice Kennedy

distinguished Harmelin's offense from the "relatively minor, nonviolent crime at issue in *Solem*," concluding that Harmelin's crime was "as serious and violent as the crime of felony murder without specific intent to kill . . . . " *id.* at 1002, 1004. Andrade's crimes did not pose a "grave harm to society," *id.* at 1002, and the nine videotapes he stole were recovered by store personnel as he exited the stores.

Moreover, petty theft is usually prosecuted as a misdemeanor. By classifying such conduct as a misdemeanor, the California legislature has indicated that petty theft is regarded as a relatively minor offense. Had Andrade's videotape thefts been his first theft offenses, the maximum penalty he could have received for each theft would have been six months in county jail and a maximum $1,000 fine. Cal. Penal Code § 490. Because he had a prior theft offense, however, they were elevated to petty theft with a prior -- a"wobbler" offense punishable either as a misdemeanor or felony. Cal. Penal Code § 666; *Terry*, 54 Cal. Rptr. 2d at 770-71. The prosecution's decision to charge the petty thefts as felonies qualified the offenses as his third and fourth strikes. *Terry*, 54 Cal. Rptr. 2d at 770-71. Thus, under a "unique quirk" in California law, Andrade's recidivism was double counted, first enhancing his misdemeanor offenses to felonies and then enhancing them again to third and fourth strikes. *Riggs*, 119 S. Ct. at 891 (Stevens, J., memorandum opinion respecting the denial of the petition for a writ of certiorari).

It is significant that the core conduct for which Andrade was sentenced is, in the first instance, classified as a misdemeanor rather than a felony. While the Supreme Court frequently defers to legislative judgments regarding the proper length of imprisonment for felony offenses, it is less clear that the same degree of deference is appropriate when extreme sentences are imposed for misdemeanor conduct. *Id.* (deference to legislative determination of punishment less pronounced when offense is not classified as a felony); *Rummel*, 445 U.S. at 274 n.11 (acknowledging that a proportionality analysis would

be relevant to a hypothetical statute making overtime parking punishable by life imprisonment).

Of course, Andrade was sentenced as a recidivist, and the gravity of his offense cannot be assessed independently of his previous criminal conduct. According to the State, Andrade's criminal record warrants the enhanced punishment and therefore justifies its severity. Not all enhanced sentences imposed on repeat offenders are constitutional, however, as demonstrated by the *Solem* Court's decision to vacate the life sentence of a seven-time felony recidivist.

California's Three Strikes law imposes a 25-year-to-life sentence on defendants previously convicted of two or more "serious" or "violent" felonies. Cal. Penal Code §§ 667(e)(2)(A), 1170.12(c)(2)(A). Andrade's predicate "serious" felonies were three counts of residential burglary adjudicated in a single proceeding more than a decade earlier. This contrasts with the defendant in *Rummel,* who served time in prison for his first felony before being convicted and serving time for his second felony -- a fact the Court found significant. *Rummel*, 445 U.S. at 278.

As noted above, Andrade has additional offenses on his record. His prior misdemeanor petty theft from 1990 permitted his present petty theft convictions to be charged as felonies and thus to qualify as third and fourth strikes.[20/] Although Andrade also has two federal convictions for transporting marijuana, they were not counted as strikes and there is no record that the court considered them when sentencing Andrade. Arguably, the federal convictions therefore should not affect our analysis as they did not affect the imposition of Andrade's 50-year-to-life

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20. Andrade also has the misdemeanor theft conviction from 1982, for which he served six days in jail and received twelve months of probation.

sentence. Even if we consider Andrade's entire criminal history record -- five felonies, two misdemeanors, and one parole violation -- it is still comparable, quantitatively and qualitatively, to that of the defendant in *Solem*. Both defendants had three burglary convictions, although only Andrade was convicted of all three in a single proceeding. All of the offenses were non-violent. Given that Andrade's sentence of 50 years to life is a sentence of life without a realistic possibility of parole, his case is most analogous to *Solem*.

c. Inference of Gross Disproportionality

A threshold comparison of the harshness of the penalty and the gravity of the crimes leads to an inference that Andrade's sentence was grossly disproportionate. Andrade will likely serve the remainder of his life in prison for shoplifting nine videotapes.

This inference of disproportionality is not dissipated by Andrade's prior criminal record. His prior "strikes" were non-violent burglaries, prosecuted in a single judicial proceeding, more than a decade before he was sentenced under the Three Strikes law. His other offenses, although not considered at sentencing, were also non-violent. Moreover, due to a unique quirk in California law, his recidivism was double-counted by first enhancing his misdemeanor petty theft offenses to felonies and then enhancing them to third and fourth strikes.

2. *Intrajurisdictional Comparison*

An intrajurisdictional comparison is only required when a sentence presents an "inference of gross disproportionality." *Harmelin*, 501 U.S. at 1005. Consequently, this second prong of the Eighth Amendment test is often mentioned, but seldom actually applied. *See, e.g., Cacoperdo v. Demosthenes*, 37 F.3d 504, 508 (9th Cir. 1994) (concluding that a comparison of the gravity of defendant's offenses with the harshness of his sentence did not raise an inference of gross disproportionality

and, therefore, no intrajurisdictional comparison was required); *United States v. Whyte*, 892 F.2d 1170, 1176 n.16 (3d Cir. 1989) (upholding life sentence without undertaking intrajurisdictional comparison).

Where, as here, the harshness of the sentence appears grossly disproportionate to the gravity of the offense and the culpability of the offender, we must assess whether the disputed sentence is excessive when compared to "sentences imposed on other criminals in the same jurisdiction. " *Solem*, 463 U.S. at 292. *See also Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring); *United States v. Meirovitz*, 918 F.2d 1376, 1381 (8th Cir. 1990) (noting that analysis under the second prong is "rare," but appropriate where challenged sentence is life without possibility of parole).

As noted above, petty theft, if committed by a first time offender, is a misdemeanor punishable by up to six months in county jail and up to a $1,000 fine. Cal. Penal Code§ 490. If a defendant has been convicted previously of a theft offense, he may be charged under California Penal Code § 666 and sentenced to up to three years in prison (or, if charged as a misdemeanor, up to one year in county jail). Cal. Penal Code §§ 18, 666. Thus, Andrade could have received a total sentence of six years in prison had he received the maximum sentences, imposed consecutively, under these provisions.

Andrade's indeterminate sentence of 50 years to life is exceeded in California only by first-degree murder and a select few violent crimes. Cal. Penal Code § 190 (first-degree murder punishable by death, life *without* parole, or 25 years to life); *id.* § 209 (kidnaping under certain circumstances punishable by life *without* parole); *id.* §§ 218 and 219 (train wrecking or derailing punishable by life *without* parole or, for § 219, death); *id.* § 12310 (unlawful explosion causing death, mayhem, or great bodily injury punishable by life *without* parole). Most violent crimes, however, are punished much less severely. *Id.* § 190 (second-degree murder punishable by 15 years to life under

most circumstances); *id.* § 193 (voluntary manslaughter punishable by up to 11 years); *id.* § 264 (rape punishable by up to 8 years); *id.* § 288 (sexual assault on a minor punishable by up to 8 years). Andrade's sentence is grossly disproportionate when compared to the above sentences for violent crimes.

The State argues that, because Andrade is a recidivist, we must compare his sentence to those of other non-violent recidivists in California. The State then lists several examples of non-violent recidivists sentenced to harsh sentences under California's Three Strikes law. *People v. Cline*, 71 Cal. Rptr.2d 41 (Ct. App. 1998) (25-year-to-life sentence for felony grand theft with twelve prior convictions for residential burglary); *People v. Goodwin*, 69 Cal. Rptr. 2d 576 (Ct. App. 1997) (25-year-to-life sentence for commercial burglary with two prior strikes for residential burglary, plus several drug related offenses and a misdemeanor battery).

Although we agree that comparisons to sentences for other recidivists are relevant, the problem with the State's argument is that it attempts to justify the constitutionally-suspect application of a statute by pointing to other applications of the same statute. We find this approach less than convincing. That said, Andrade's sentence is unusual even when compared to other sentences for non-violent recidivists under the Three Strikes law. Andrade's sentence is twice as long as the "comparable" sentences cited by the State. *Cline*, 71 Cal. Rptr. 2d 41 (25 years to life); *Goodwin*, 69 Cal. Rptr. 2d 576 (same). It is twice as long as the sentence in *Terry*, which upheld a third-strike conviction for petty theft with a prior. 54 Cal. Rptr. 2d at 770-71 (nature of prior strikes not specified). Indeed, we have found no other published case upholding a sentence of 50 years to life in prison for a non-violent recidivist under the Three Strikes law.[21]

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21. *Ingram*, not cited by the State, held that a defendant convicted of two counts of residential burglary with two prior strikes

Our intrajurisdictional comparison of sentences in California supports the conclusion that Andrade's sentence was grossly disproportionate to his crimes and therefore proscribed by the Eighth Amendment. His sentence is significantly greater than the sentences under California law for most violent crimes. Moreover, it is unusual even when compared to other applications of the Three Strikes law.

3. *Interjurisdictional Comparison*

California's Three Strikes law was one of twenty-five laws with this label enacted nationwide between 1993 and 1995. John Clark et al., *"Three Strikes and You're Out": A Review of State Legislation in* National Institute of Justice, U.S. Department of Justice, *Research in Brief* at 1 (Sept. 1997). Many other states have similar laws under different names which likewise punish recidivists more severely than first-time offenders. *See generally People v. Riggs*, No. E019488, 1997 WL 1168650, *4 n.2 (Cal. Ct. App. 1997) (unpublished) (indicating that at least forty states have some form of recidivist statute).

Of those jurisdictions with some form of recidivist sentencing statute, the State suggests only four where Andrade's triggering offense (petty theft with a prior) could qualify for recidivist sentencing: Rhode Island, West Virginia, Texas, and Louisiana. Even in these four states, however, Andrade could not receive a sentence nearly as severe as he did under California's Three Strikes law on the basis of his two prior strikes for residential burglary. If we also consider Andrade's prior convictions not included in the calculation of his sentence under California's Three Strikes law -- his 1982 misdemeanor

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should be sentenced to two consecutive 25-year-to-life terms. 48 Cal. Rptr. 2d at 266. Unlike the instant case, however, the triggering offenses in *Ingram* were "serious" felonies and one of the defendant's prior strikes was for a violent offense (burglary at knifepoint). *Id.* at 267-68.

theft offense and his two federal convictions for transportation of marijuana -- only in Louisiana is it possible for Andrade to receive a comparable sentence. Even then, the sentence would be vulnerable to a challenge under the Louisiana state constitution.

a. Rhode Island

In Rhode Island, a three-time felon may be sentenced to an additional 25 years in prison. R.I. Gen. Laws § 12-19-21. Unlike in California, however, theft of merchandise valued at less than $100 is not a felony in Rhode Island, even if the defendant has a prior theft conviction. *Compare id.* § 11-41-20(d) *with* Cal. Penal Code § 666. Each of Andrade's petty theft offenses involved theft of property valued at less than $100 ($84.70 and $68.84, respectively). Consequently, Andrade's petty theft offenses would not be felonies in Rhode Island, and he would not be eligible for the 25-year sentence enhancement. The maximum term of imprisonment he could receive would be one year for each petty theft offense. R.I. Gen. Laws § 11-41-20(d).

The Rhode Island habitual offender sentencing scheme also differs from California's Three Strikes law in that the defendant must serve "two or more" separate terms of imprisonment before he qualifies for habitual offender status. *Id.* § 12-19-21(a). Here, Andrade pled guilty to and was sentenced for his three burglary offenses in a single proceeding.

In addition, although the Rhode Island habitual offender statute requires the sentencing judge to order the defendant to serve a minimum number of years of his sentence before the defendant becomes eligible for parole, the judge's discretion to determine that minimum number of years is not restricted. *Id.* § 12-19-21(c). California's Three Strikes law does not afford any such discretion to judges. The judge must impose a mandatory minimum term without possibility of parole. *Cervera*, 16 P.3d at 181.

Therefore, for multiple reasons, Andrade could not receive as severe a sentence in Rhode Island as he did in California.

b. West Virginia

Andrade could not be sentenced to life in prison under the West Virginia habitual offender statute, W. Va. Code § 61-11-18(c). The West Virginia Supreme Court has held that a life sentence imposed on a non-violent recidivist offender violates the express requirement of proportionality in sentencing mandated by Article III, Section 5 of the West Virginia state constitution. *State v. Deal*, 358 S.E.2d 226, 231 (W. Va. 1987) (vacating sentence of non-violent recidivist on grounds that life in prison was disproportionate to offenses); *State v. Hedrick*, 391 S.E.2d 614, 622 (W. Va. 1990) (reversing life sentence for burglary where prior felonies were delivery of a controlled substance and breaking and entering). As a non-violent recidivist, Andrade could not receive a life sentence in West Virginia.

c. Texas

In Texas, petty theft is not punishable as a felony unless the defendant has *two* previous theft convictions. Tex. Penal Code Ann. § 31.03(e)(4)(D). Misdemeanor convictions do not trigger Texas's habitual offender law. *Id.* § 12.42. If Andrade's only prior theft offense were his 1990 petty theft conviction (i.e., disregarding his 1982 misdemeanor theft conviction, as the State in its brief and the state courts did), Andrade's present theft offenses would only be misdemeanors in Texas, each punishable by up to six months in jail and up to a $2,000 fine.

Even if both of Andrade's prior theft convictions are counted, his present petty thefts would be considered only "state jail felon[ies]." *Id.* § 31.03(e)(4)(D). Under Texas's habitual offender law, a state jail felony will be punished as a second-degree felony (with up to 20 years in prison) if the defendant has one or more prior felonies. *Id.* §§ 12.42(a)(2) & (3), 12.33.

It follows that, in Texas, Andrade could receive up to 40 years in prison if he were sentenced to consecutive terms.

Texas, however, has a generous parole policy. Except for those accused of certain violent crimes, inmates are eligible for parole after serving as little as one-fourth of their sentence (or less, because inmates may apply good-time credit to their time served). Tex. Govt. Code Ann. § 508.145(f). Thus, if Andrade were sentenced to 40 years in Texas, he would be eligible for parole in 10 years (even less, with good-time credit)

d. Louisiana

At the time the California courts considered Andrade's appeal, Louisiana was the only state among the four cited by the State where Andrade could receive a sentence comparable to 50 years to life,[22/] but only if a Louisiana court considered both Andrade's 1982 misdemeanor theft conviction and his two federal convictions for transporting marijuana in addition to those convictions considered in the calculation of Andrade's sentence under California's Three Strikes law. Even then, such a sentence would be vulnerable to a challenge as impermissibly excessive under the Louisiana state constitution.

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22. Louisiana amended its recidivism statute this year, 2001 La. Sess. Law. Serv. 403 (West), and Andrade would no longer be eligible for a comparable sentence. Under the revised statute, the triggering offense must be "a crime of violence, a sex offense, or .. . a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more or any other crimes punishable by imprisonment for twelve years or more" in order to count as a third or fourth strike. Because the sentence for theft with two priors in Louisiana is a maximum of two years, La. Rev. Stat. Ann. § 14:67(B)(3), his current crimes would not count as third or fourth strikes. The current crimes could be treated as second strikes, La. Rev. Stat. Ann. § 15:529.1(A)(1)(a), in which case he would receive a maximum of eight years, or twice the maximum sentence for each of the petty thefts with priors.

Similar to Texas, theft of less than $300 is punishable as a felony under Louisiana law only if a defendant has *two* previous theft convictions. La. Rev. Stat. Ann. § 14:67(B)(3). Misdemeanors will not trigger Louisiana's habitual offender law.[23] *Id.* § 15:529.1.

Louisiana's habitual offender law provides, in relevant part, that a defendant convicted of a fourth or subsequent felony be punished with a minimum term of twenty years in prison without the possibility of parole. *Id.* § 15:529.1(A)(1)(c)(i), (G). Andrade's three prior burglary convictions would be treated as a single prior felony because Louisiana courts have consistently interpreted the law to have a sequential requirement for enhanced penalties. *State v. Butler*, 601 So.2d 649, 650 (La. 1992); *State v. Corry*, 610 So.2d 142, 147 (La. Ct. App. 1992) (applying the sequential requirement to three counts of simple burglary entered on the same day). His two federal convictions for transportation of marijuana, however, would likely count as his second and third felony convictions. La. Rev. Stat. Ann. § 15:529.1(A)(1). Accordingly, under this scenario, Andrade, in Louisiana, could receive two 20-year sentences without parole -- 40 years if sentenced consecutively. Moreover, if either of his federal transportation of marijuana offenses were punishable under the Louisiana Uniform Controlled Dangerous Substances Law by more than five years, Andrade could receive a sentence of life without the possibility of parole in Louisiana. *Id.* § 15:529.1(A)(1)(c)(ii).

Although it is possible that Andrade could have qualified for a sentence under Louisiana's Habitual Offender Law comparable to the sentence he received under California's Three

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23. Therefore, if we ignored Andrade's 1982 misdemeanor theft conviction, his present petty thefts would be only misdemeanors in Louisiana, each punishable by up to six months in prison and up to a $500 fine. La. Rev. Stat. Ann. § 14:67(B)(3).

Strikes law, there is a distinct possibility, unlike in California, that a Louisiana court might have invalidated such a sentence as excessive under its state constitution. A Louisiana court, for example, recently invalidated as excessive a life sentence under the Habitual Offender Law for a defendant convicted of "misappropriating or taking over $500" whose prior crimes were "two thefts under $100, one theft over $100, several counts of issuing worthless checks, check forgery,[and] simple robbery [for stealing a bicycle after pushing the minor off it]." *State v. Hayes*, 739 So.2d 301, 303-04 (La. Ct. App. 1999); *see also State v. Burns*, 723 So.2d 1013 (La. Ct. App. 1998) (invalidating as excessive under the Louisiana state constitution a life sentence for possession and distribution of two rocks of crack cocaine where defendant's prior felonies had been non-violent and there were other mitigating circumstances).

The possibility that Andrade might have received a comparable sentence in one other jurisdiction does not render his sentence constitutional under the Eighth Amendment. *Solem*, 463 U.S. at 299-300 (holding that defendant's sentence violated the Eighth Amendment while acknowledging that defendant could have received the same sentence in one other state, Nevada); *see also Henderson*, 258 F.3d at 713-14 (holding that defendant's sentence violated the Eighth Amendment while acknowledging that defendant could have received the same sentence in Idaho). Indeed, that Andrade could receive a comparable sentence in only one other state -- and, even then, only if that state considered prior convictions not necessary for application of California's Three Strikes law -- supports our conclusion that Andrade's sentence was grossly disproportionate to his crimes. *Harmelin*, 501 U.S. at 1005 ("The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime.")

[4]We thus conclude, following the revised three-factor test articulated by Justice Kennedy in *Harmelin*, that: (1) Andrade's punishment of 50 years to life raises an inference of gross

disproportionality when compared to his two petty thefts of nine videotapes worth $153.54, even in light of his prior felony and misdemeanor convictions; (2) Andrade's sentence is substantially more severe than sentences for most violent crimes in California and is unusual even when compared to other applications of California's Three Strikes law; and (3) Andrade could not have received such a severe sentence anywhere else, with the possible exception of Louisiana. Accordingly, we disagree with the California Court of Appeal and conclude that Andrade's sentence is so grossly disproportionate to his crime that it violates the Eighth Amendment to the United States Constitution.

C. Decision of the California Court of Appeal

[5] Of course, under AEDPA, mere disagreement is not enough. We may grant relief only if the state court's decision is "contrary to, or involves an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

[6]Our review of the Supreme Court's decisions in *Rummel* (1980), *Solem* (1983), and *Harmelin* (1991) demonstrates that the law governing the application of the Eighth Amendment to non-violent offenders sentenced to life imprisonment was clearly established by the time of the California Court of Appeal's 1997 decision in this case. *See also Riggs*, 119 S. Ct. at 892 (Stevens, J., memorandum opinion respecting the denial of the petition for a writ of certiorari) (stating that petitioner could assert his claim in a petition for a writ of habeas corpus "since [he] is asking us to apply a settled rule of Eighth Amendment law") Although we follow the test prescribed by Justice Kennedy in *Harmelin*, both *Rummel* and *Solem* remain good law and are instructive in *Harmelin*'s application.

The state court begins its analysis of Andrade's Eighth Amendment claim by noting that "the current validity of the *Solem* proportionality analysis is questionable in light of

Harmelin." The remainder of its discussion relies exclusively on *Rummel*. It compares Rummel's three felonies with Andrade's two petty thefts with a prior and his three residential burglaries from 1983. It then concludes, "[c]omparing [Andrade's] crimes and criminal history with that of defendant Rummel ,we cannot say the sentence of 50 years to life at issue in this case is disproportionate and constitutes cruel and unusual punishment under the United States Constitution."

Although the state court appears to review for "gross disproportionality," its disregard for *Solem* results in an unreasonable application of clearly established Supreme Court law. Although *Solem*'s three-factor analysis was modified by *Harmelin*, only two justices of the Supreme Court would have held that *Solem* is no longer good law. Indeed, as discussed above, Justice Kennedy contrasted the severity of the defendant's crime in *Harmelin* with the "'relatively minor'" nature of the offenses in *Solem*. *Harmelin*, 501 U.S. at 1002 (quoting *Solem*, 463 U.S. at 296-97).

[7]A proper analysis of gross disproportionality requires a comparison to all three cases: *Rummel*, *Solem*, and *Harmelin*. While Andrade's crimes and history are comparable to those of the defendants in both *Rummel* and *Solem*, his life sentence with no possibility of parole for 50 years is most analogous to *Solem*. The state court's failure to address *Solem* yields an unreasonable conclusion that a non-violent recidivist sentenced to such a severe sentence for two misdemeanor offenses does not raise an inference of gross disproportionality.[24/] Its conclusion that

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24. Although the state court ends its analysis of Andrade's Eighth Amendment claim with a comparison to *Rummel*, it evaluates the second and third factors in its discussion of Andrade's "cruel and unusual" claim under the California state constitution. This discussion is arguably irrelevant for our purposes because it did not concern federal law.

Even if we treat it as a discussion of federal law, however,

Andrade's sentence does not violate the Eighth Amendment is irreconcilable with the Supreme Court's decision in *Solem* and thus constitutes clear error.

V. CONCLUSION

Our decision does not invalidate California's Three Strikes law. Rather, our holding is limited to the application of the Three Strikes law to the unusual circumstances of Andrade's case. Even so, we do not arrive at this conclusion lightly. Sentencing laws "involve[ ] substantive penological judgment that, as a general matter, is `properly within the province of the legislatures, not courts.' " *Harmelin* , 501 U.S. at 998 (citing *Rummel*, 445 U.S. at 275-76). We do not advocate a particular penological theory nor challenge the people of California's " `independent power . . . to articulate societal norms through criminal law.' " *Id.* at 999 (citing *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)). Yet, the Eighth Amendment does not permit the application of a law which results in a sentence grossly disproportionate to the crime. Andrade's sentence of life in prison with no possibility of parole for 50 years is grossly disproportionate to his two misdemeanor thefts of nine

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our conclusion that the state court unreasonably applied clearly established Supreme Court law remains unchanged. The state court unreasonably concluded that the "second factor effectively is irrelevant " because "all three strikes defendants are punished in the same manner." While such defendants are all punished with variations of a life sentence, they have not all committed the same crimes. Andrade's case is unusual even when compared to other three-strikes defendants, and his sentence is extreme when compared to sentences for the State's most violent crimes.

The state court of appeal's discussion of the third factor is equally flawed. It concludes that many states, including Texas, "impose severe punishments on repeat felony offenders," whereas our analysis shows that Andrade could not have received such a severe sentence in any other state with the possible exception of Louisiana.

videotapes, even when we consider his history of non-violent offenses. The California Court of Appeal's conclusion to the contrary resulted from an unreasonable application of clearly established Supreme Court law.

Accordingly, we **REVERSE** the judgment of the district court and **REMAND** with instructions to issue the writ of habeas corpus if, within 60 days following the issuance of our mandate, the state has not resentenced Andrade.

SNEED, Circuit Judge, Concurring in part and Dissenting in part:

I agree with the Majority's conclusion in Part II that Andrade filed the functional equivalent of a timely notice of appeal. I respectfully dissent, however, from the Majority's conclusion in Parts IV and V that Andrade's sentence violates the Eighth Amendment.

The sentence imposed in this case is not one of the "exceedingly rare" terms of imprisonment prohibited by the Eighth Amendment's proscription against cruel and unusual punishment. *Harmelin v. Michigan*, 501 U.S. 957, 1001(1991) (quoting *Solem* v. *Helm*, 463 U.S. 277, 289-290 (1983) (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.")). Two consecutive sentences of 25 years to life--with parole eligibility only after the minimum 50 years--is obviously severe. Nevertheless, it is the sentence mandated by the citizens of California through the democratic initiative process and, additionally, legislated by their elected representatives. Cal. Pen. Code § 667(e)(2)(A) ("three strikes" provision mandating minimum term of 25 years for recidivist felon); Cal. Pen. Code § 1170.12 (codifying state-wide initiative identical to "three strikes" legislation).

It has long been the law of this Circuit that, "[g]enerally, as

long as the sentence imposed on a defendant does not exceed statutory limits, this court will not overturn it on Eighth Amendment grounds." *U.S. v. Parker*, 241 F.3d 1114, 1117 (9th Cir. 2001) (citing *United States v. Zavala-Serra*, 853 F.2d 1512, 1518 (9th Cir. 1988) (citing *United States v. Washington*, 578 F.2d 256, 258 (9th Cir.1978))). This case presents no opportunity to set aside, or qualify, this long-established and sound precedent.

I

In reversing Appellant's sentence, the majority purports to rely on the opinion of Justice Kennedy in *Harmelin* v. *Michigan*, 501 U.S. at 996 (Kennedy, J., concurring in the judgment). That opinion (joined by two other members of the court) held that the Eighth Amendment "forbids extreme sentences that are `grossly disproportionate' to the crime." *Id.* at 1001. While recognizing that the Eighth Amendment includes a "proportionality principle," Justice Kennedy also acknowledged that "its precise contours are unclear." *Id.* at 998. He attempted to "give content to the uses and limits of proportionality review" by identifying four principles that inform the Court's application of the Eighth Amendment to lengthy prison terms. *Id.*

Each of the four principles underlying *Harmelin* 's "gross disproportionality" analysis favors the affirmance of Appellant's sentence. The first of these is that "as a general matter [it] is properly within the province of legislatures, not courts" to fix punishments for crimes. *Id.* Thus,"reviewing courts . . . should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes." *Id.*

The sentencing scheme in the instant case was the result of both popular vote (Proposition 184 was approved by 71.84 percent of the electorate) and legislative action. Our deference should be at its apex. We have before us the clearest indication

possible that severe, mandatory sentences for recidivist offenders is the expressed penal philosophy of the citizens of California. The initiative process permits the electorate to speak for itself, and its voice should be heard, not ignored.

The second principle underlying proportionality review "is that the Eighth Amendment does not mandate adoption of any one penological theory." *Id.* at 999. The Eighth Amendment permits states to grant "different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Id.* All are legitimate goals of sentencing, and the legislature has plenary power to prescribe sentencing accordingly.

Consequently, we must accord great deference to state-mandated sentences. We should not employ our power to strike down a sentence as unduly harsh when its primary purpose is the incapacitation of an habitual criminal offender. Even were it our collective judgment that the defendant is capable of rehabilitation, that judgment should not trump the voice of the state legislature. California's "three strikes" sentencing regime reflects a judgment that society's interest is best served by imprisonment of repeat felony offenders and a correlative determination that more lenient treatment of such offenders is inappropriate. *People v. Cooper*, 43 Cal.App.4th 815, 824 (1996) ("By enacting the three strikes law, the Legislature acknowledged the will of Californians that the goals of retribution, deterrence, and incapacitation be given precedence in determining the appropriate punishment for crimes."). It is true that over time public attitudes change. However, it is not our duty to anticipate the future legislative conduct of the State of California.

The third principle cited by Justice Kennedy is that "marked divergences both in underlying theories of sentencing and the length of prescribed prison terms are the inevitable, [and] often beneficial, result of the federal structure." *Harmelin*, 501 U.S. at 999. It is not, to repeat, the role of the

federal courts to establish the appropriate sentences that each state is obligated to follow in punishing those who violate its laws.

The fourth principle that guides our review of Appellant's sentence is that such review "should be informed by `objective factors to the maximum possible extent.' " *Id.* at 1000 (quoting *Rummel*, 445 U.S. at 274-275). Justice Kennedy noted that objective factors exist to permit review of a sentence of death. *Id.* at 1000 ("[T]he objective line between capital punishment and imprisonment for a term of years finds frequent mention in our Eighth Amendment jurisprudence."). He observed, however, "that we lack clear objective standards to distinguish between sentences for different terms of years." *Id.* at 1001. *See also Solem*, 463 U.S. at 294 ("It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not."); *Rummel*, 445 U.S. at 275 (the line between death and other punishments is "considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years").

Informed by these four principles, the *Harmelin* court concluded that a sentence of life imprisonment without possibility of parole for possession of cocaine was not cruel and unusual. "A rational basis exists for [the state] to conclude that petitioner's crime is as serious and violent as the crime of felony murder without specific intent to kill, a crime for which no sentence of imprisonment would be disproportionate. " *Id.* at 1004. There is an equally rational basis for the sentence imposed on Appellant in this case:

> The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses

> serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time.

Rummel, 445 U.S. at 284. The "uses and limits" of proportionality review, as defined in *Harmelin*, demand that we respect this explanation if it is rational. *Harmelin*, 501 U.S. at 998. With respect to Appellant's sentence, I believe that it is.

The majority, however, has attempted to apply *Harmelin*'s narrow holding -- the prohibition on grossly disproportionate sentences -- without thoughtful consideration of the principles underlying its holding. The result of this approach is predictable and, in fact, was predicted by two members of the *Harmelin* majority: "the proportionality principle becomes an invitation to imposition of [the] subjective values" of federal judges. *Id.* at 986 (Scalia, J.)

In short, for all its reliance on *Harmelin*, that case does not compel the outcome reached by the majority today. In fact, just the opposite is true. *Harmelin* counsels that judicial review of legislatively determined sentences should reflect both deference to the elected branches of government and deference to the varied, but rational, determinations of the 50 states. Therefore, we should affirm the sentence in this case.

II

The principles articulated by Justice Kennedy, restated above, and employed in a manner consistent with their purpose, are sufficient to restrain any federal judicial tendency to employ "cruel and unusual punishment" as a justification for expansive constitutionalization of permissible sentencing by the states. This fact is borne out by numerous cases from our sister circuits. In the wake of *Harmelin*, not a single court has struck down the sentence of an habitual offender on Eighth

Amendment grounds.[1] The Seventh Circuit in *Bocian v. Godinez*, 101 F.3d 465, 472 (7th Cir. 1996), in concluding that the accused's sentence was not "contrary to" the gross disproportionality analysis of *Harmelin*, recognized that the *Harmelin* majority emphasized that "state legislatures have great leeway in determining the appropriate punishments for specific crimes." Thus, the state court's refusal to "substitute its judgment or preference as to punishment for that of the sentencing court" -- far from being contrary to clearly established federal law -- was consistent with the *Harmelin* analysis. *Id.* at 473.

Likewise, in *McGruder v. Puckett*, 954 F.2d 313 (5th Cir. 1992), the court affirmed a life sentence without possibility of parole imposed on an habitual offender where the infraction that triggered the life sentence was the offense of auto burglary. Applying the *Harmelin* analysis, as articulated by Justice Kennedy, the court dismissed the defendant's argument that life in prison without possibility of parole was grossly disproportionate to the crime of auto burglary. "We think that the argument ignores the essence of the statute under which he was sentenced . . . . Under the statute, his sentence is imposed to reflect the seriousness of his most recent offense, not as it stands alone, but in the light of his prior offenses." *McGruder*, 954 F.2d at 316.

These two opinions also reflect what has been, until today, the consensus of the federal courts with regard to the scope of proportionality review under *Harmelin*.[2] These cases

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1. In fact, in the decade since *Harmelin* was decided, only one sentence has been struck down as proscribed by the Eighth Amendment to the U.S. Constitution. That case, *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001), involved a first time drug offender, not an habitual offender as is the case here.

2. *See, e.g., United States v. Cardoza*, 129 F.3d 6, 19 (1st Cir. 1997) (affirming sentence of 20 years imprisonment for possession of a single bullet when defendant had a prior felony history); *United States v. Prior*, 107 F.3d 654, 659 (8th Cir. 1997) (affirming life sentence for drug offender who, though he had three prior felony drug convictions, had never before served a prison term).

underscore the fact that judicial deference toward legislative determinations of suitable sentences is particularly appropriate with regard to treatment of recidivist offenders.[3] Adding the role of prosecutorial discretion to the mix of relevant sentencing factors makes the "gross disproportionality" analysis of questionable value when applied to recidivist offenders. See *Rummel*, 445 U.S. at 281 ("Another variable complicating the calculus is the role of prosecutorial discretion in any recidivist scheme."). In sum, "gross disproportionality," as applied in the recidivism context, requires adherence to the principles underlying the Kennedy opinion.

Bringing all of these factors to bear on the "gross disproportionality" inquiry, no other circuit has overturned a sentence imposed pursuant to a recidivist sentencing statute. Justice Scalia in *Harmelin* had it right. "Disproportionality" is influenced by the prevailing attitude toward the seriousness of particular crimes and the appropriateness of harsh punishments. These judgments can be altered either within years, decades or centuries. "Neither Congress nor any state legislature has ever set out with the objective of crafting a penalty that is disproportionate; yet . . . many enacted dispositions seem to be

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3. Even assuming a court is competent to determine an offender's culpability (on a relative scale) by comparing him to others who have committed the same or more serious crimes, *See Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001), the complexity of this comparison is magnified when the offender in question has a lengthy criminal history. "If nothing else, the three-time offender's conduct supports inferences about his ability to conform with social norms that are quite different from possible inferences about first or second-time offenders." *Rummel*, 445 U.S. at 282 n.27.

so -- because they were made for other times or other places, with different social attitudes, different criminal epidemics, different public fears, and different prevailing theories of penology." *Harmelin*, 501 U.S. at 985 (Scalia, J.).

III

To repeat, our review of state mandated sentences is circumspect and deferential. Nevertheless, *Harmelin* does require us to assess Appellant's sentence for gross disproportionality; this inquiry is limited to an examination of the gravity of the offenses and the harshness of the sentence. While petty theft offenses are admittedly not grave, Appellant's recidivist nature makes his current activity much more serious.

Appellant's criminal history commenced in 1982 with a misdemeanor theft. While on probation for this theft, he burglarized three separate residences in 1983, felonies resulting in Appellant's first and second strikes. In 1990 Appellant was convicted for a second misdemeanor theft. Then in 1995, Appellant was arrested for two separate shoplifting offenses--each elevated to felonies due to his prior theft convictions.

Under California's sentencing scheme, these 1995 shoplifting convictions amounted to Appellant's third and fourth strikes, which yielded two consecutive sentences of twenty-five years to life, totaling fifty years to life. [4/] This is not a lenient

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4. It should be emphasized that Andrade's sentence is not one fifty-year sentence for thefts totaling $153.54. Appellant, in fact, is facing two consecutive twenty-five year sentences for two separate felony offenses. The Majority's comparison of Andrade's sentence to other"Three Strikes"defendants misses this point. (Majority Opinion 15286). Appellant's sentence is "twice as long" as the sentences of these other defendants because he as committed twice the number of offenses. *See People v. Cline*, 71 Cal. Rptr. 2d 41 (affirming sentence of 25 years to life for theft of clothing); *People v. Goodwin*, 69 Cal. Rptr. 2d 576 (affirming sentence of 25 years to life for stealing a pair

sentence; however, it is equally clear that the Appellant is a recidivist. His probation report sets forth, in addition to the above enumerated offenses, two separate federal convictions for transporting marijuana, dismissal of seven state residential burglary charges, and a parole violation for escape from federal prison. The probation report refers to Appellant's acknowledged heroin addiction and that Appellant admits to stealing to support his drug habit. The probation report also states that Appellant is unemployed and does not help care for his three children. Before his most recent conviction, Appellant had been in and out of state or federal prison a total of six times. Under such circumstances, it is rational for a sentencing court to determine that a term of twenty-five years to life is not a grossly disproportionate sentence for each of Appellant's current crimes.

One should neither exaggerate nor minimize Appellant's culpability. His guilt is not in dispute. Nor is the fact of his recidivism, nor the applicability of the three strikes sentencing law. The simple statement of his history of criminal activity is

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of pants); *People v. Terry*, 54 Cal. Rptr. 2d 769 (affirming sentence of 25 years to life for stealing handbag left in open car). *See also Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001) ("in any rate it is wrong to treat stacked sanctions as a single sanction. To do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim."); *Hawkins v. Hargett*, 200 F.3d 1279, 1285 (10th Cir. 1999) (finding no Eighth Amendment violation in sentences totaling 100 years when these sentences were for *combined* separate offenses of rape and robbery); *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988) ("Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence."); *State v. Four Jugs of Intoxicating Liquor*, 58 Vt. 140, 2 Atl. 586, 593 (1886), quoted in *O'Neil* at 331 ("It would scarcely be competent for a person to assail the constitutionality of the statute prescribing punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted upon him, he might be kept in prison for life.").

enough to show that the state court's determination of the proper punishment--even if found to be erroneous--was not *clearly* erroneous as this Court has defined it. *See Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000) ("we hold that under AEDPA we must reverse a state court's decision as involving an `unreasonable application' of clearly established federal law . . . when our independent review . . . does not merely allow us ultimately to conclude that the petitioner has the better of two reasonable legal arguments, but rather leaves us with a `firm conviction' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous"). Therefore, to repeat, a "rational basis" exists for the state of California to conclude that the interests of society are best served by Appellant's incarceration for a minimum of fifty years. *Harmelin*, 501 U.S. at 1004 ("rational basis exists" to justify life in prison without possibility of parole for drug possession offense); *Van Tran v. Lindsey*, 212 F.3d at 1159 ("some erroneous applications may nonetheless be reasonable") (citing *Williams v. Taylor*, 529 U.S. 362, 410 (2000). Defendant's sentence is thus not an unreasonable application of clearly established federal law.

I respectfully concur in part and dissent in part.

APPENDIX B

APPENDIX B

[Filed February 18, 1999]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

LEANDRO ANDRADE,	)	CV 98-6776-CAS
	)	(SH)
	)	JUDGMENT
Petitioner,	)	
	)	
	)	
v.	)	
	)	
ERNEST B. ROE,	)	
	)	
Respondent.	)	
	)	

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed with prejudice.

DATED: February 18, 1999

/s/
CHRISTINA A. SNYDER
UNITED STATES

DISTRICT JUDGE

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP RULE 77 (d)

APPENDIX C

APPENDIX C

[Filed February 19, 1999]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

LEANDRO ANDRADE,	)	CV 98-6776- CAS (SH)
	)	ORDER ADOPTING
	)	REPORT AND
Petitioner,	)	RECOMMENDATION
	)	OF UNITED STATES
v.	)	STATES MAGISTRATE
	)	JUDGE
	)	
ERNEST B. ROE,	)	
	)	
Respondent.	)	
	)	

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the attached Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition filed herein is dismissed with prejudice.

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP RULE 77 (d)

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by the United States mail on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: February 18, 1999

/s/
CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

APPENDIX D

APPENDIX D

[Filed February 19, 1999]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

LEANDRO ANDRADE,	)	CV 98-6776-CAS (SH)
	)	REPORT AND
Petitioner,	)	RECOMMENDATION
	)	OF UNITED STATES
v.	)	MAGISTRATE JUDGE
	)	
ERNEST B. ROE,	)	
	)	
Respondent.	)	
	)	

This Report and Recommendation is submitted to United States District Judge Christina A. Snyder pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I. PROCEDURAL BACKGROUND

On March 21, 1996, petitioner was found guilty of two felony counts of petty theft, in violation of California Penal Code § 666. (C.T. pp. 106-108.)[1] (Case No. FMV-018257, which charged petitioner with the first count of petty theft with a prior count, was consolidated with San Bernardino County Superior Court case number FMV-09140, which charged

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1. "C.T." refers to "Clerks's Transcripts".

petitioner with a second petty theft with a prior count.)

The Information in Case No. FMV-018257 also alleged that petitioner had sustained three prior serious felony convictions within the meaning of California Penal Code § 667, subdivisions (b) through (i). Specifically, the prior felony convictions involved three separate residential burglaries committed by petitioner on April 26, 1983. (C.T. p. 46.) On March 27, 1996, the jury found the prior conviction allegations true. (C.T. pp. 189-90.)

Petitioner was sentenced to prison for twenty-five years to life on each of counts one and two, pursuant to California Penal Code § 667(e)(2), and ordered to serve the terms consecutively. (C.T. pp. 247-48.) On May 13, 1997, the California Court of Appeal affirmed the judgment. (Ret., Lodgment 3.) On July 23, 1997, the California Supreme Court denied petitioner's Petition for Review. (Ret., Lodgment 5.)

On August 19, 1998, petitioner filed a Petition for Writ of Habeas Corpus (the "Petition") in this court. On September 9, 1998, respondent filed an Answer, followed by a Return on September 25, 1998. In the Return, respondent argued that petitioner had failed to exhaust state remedies. On October 1, 1998, petitioner filed a Traverse.

On October 2, 1998, this court found that petitioner had fairly presented both of his claims to the California Supreme Court, and ordered respondent to file a Supplemental Return addressing the merits of the Petition. See Minute Order dated October 2, 1998. On November 2, 1998, respondent filed its Supplemental Return. Petitioner filed a Supplemental Traverse on December 22, 1998. The matter has now been taken under submission.

II. STATEMENT OF FACTS

Petitioner's two current felony convictions for petty theft

(with prior theft convictions) result from two separate occasions in November 1995, during which petitioner stole videotapes from two different K-Mart stores. (R.T. pp. 68-101, 117-134.)[2/]

III. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") works substantial changes to [the statutes] which authorize federal courts to grant the Writ of Habeas corpus. Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996). The instant Petition was filed on August 19, 1998, and must be analyzed pursuant to the AEDPA.

Section 2254(d) of Title 28 U.S.C. now reads:

> "An application for a Writ of Habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

IV. DISCUSSION

1. California's Three Strikes Law is not unconstitutionally vague or ambiguous.

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2. "R.T." refers to "Reporter's Transcripts".

Petitioner alleges that California's Three Strikes Law is unconstitutionally vague and ambiguous. (Pet., p. 6; Pts. & Auths., Ground I.) He claims that he was sentenced under this statute even though he only had one prior prison commitment[3], and that the statute's vagueness and ambiguity allow for subjective, arbitrary and discriminatory application. (Id.) He further argues that the statute does not give specific notice of the punishment it entails. (Id.) Accordingly, he argues, "[t]he Three Strikes [L]aw violates basic fundamental principals of the Due Process Clause and Equal Protection of the laws..." (Id.)

California Penal Code § 667, subdivisions (b) through (i), sets forth what is commonly known in California as the "Three Strikes Law". The statute provides, in relevant part, that if a defendant is convicted of more than one felony and it has been pled and proved that he has more than one prior felony conviction as defined in California Penal Code § 667, subdivision (d), he shall be sentenced to an indeterminate term of at least twenty-five years to life for each current conviction and the sentences shall be consecutive. § 667, subdivisions (c)(6) and (e)(2)(A)(ii).

In the present case, petitioner was convicted of committing two felonies, with additional true findings as to allegations that petitioner had sustained three qualifying prior felony convictions. (C.T. pp. 106-08, 189-90.) In accordance with the Three Strikes Law, petitioner was sentenced to two consecutive twenty-five year to life terms. (C.T. pp. 247-48.)

The fact that petitioner only served one prior prison term prior to receiving the two current convictions is not relevant to

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3. In his Petition for Review before the California Supreme Court, petitioner argued that the trial court should not have found that his prior three burglary convictions constituted multiple strikes because he only served one prior prison commitment for all three convictions. (Ret., Lodgment 4, p. 8.)

his argument that he should not have been sentenced under the Three Strikes Law. As discussed above, California Penal Code § 667 (e)(2) clearly allows for petitioner to receive the sentences the trial court imposed on him.[4]

His argument that the statute is vague and ambiguous because it is unclear whether his three prior (burglary) convictions, which were not brought and tried separately, constitute only one prior conviction or multiple prior convictions, also fails. (Pet., p. 6; see also Pet. for Rev., Lodgment 4, pp. 8-13.) Respondent correctly notes that a federal court must, when considering a challenge to the validity of a state law, consider any limiting construction that a state court has given. Kolender v. Lawson, 461 U.S. 352,356 (1983), quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 (1982).

California appellate courts, including the California Supreme Court, have interpreted the Three Strikes Law as not requiring that a prior felony be brought and tried separately from another qualifying conviction in order to be counted as a separate strike. People v. Fuhrman, 16 Cal. 4th 930 (1997) ("The reference to 'prior conviction' in Pen. Code, § 667, subd. (d), which defines a prior felony conviction for purposes of the three strikes law, and which does not contain an explicit 'brought and tried separately' limitation, is neither vague nor ambiguous."). Therefore, the state courts' rejection of petitioner's argument regarding the statute's alleged vagueness or ambiguity was reasonable and consistent with Kolender and Village of Hoffman Estates.

2. Sentencing petitioner under the Three Strikes Law

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4. To the extent that petitioner is attempting to argue that his sentence is improper under California Penal Code § 667.5, petitioner's argument fails. Petitioner was not sentenced under § 667.5, but under § 667(e)(2).

did not violate his rights under the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment provides that no state "shall deprive any person of life, liberty or property without due process of law". U.S. Const. amend. XIV. "[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them'." Foucha v. Louisiana, 504 U.S. 71, 79, citing Zinermon v. Burch, 494 U.S. 113, 125 (1990). "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Foucha, citing Youngberg v. Romeo, 457 U.S. 307, 316(1982).

Under its police power, however, a state may imprison convicted criminals for the purposes of deterrence and retribution. Foucha, 504 U.S. at 80; Bearden v. Georgia, 461 U.S. 660, 669 (1983). The constitutional limit placed on the state's power by the Fourteenth Amendment is "that the nature and duration of the commitment [must] bear some reasonable relation to the purpose for which the individual is committed." Jackson v. Indiana, 406 U.S. 715,737 (1972). The United States Supreme Court has found valid the objective of punishing repeat offenders more severely by imposing longer prison sentences on them. United States v. Salerno, 481 U.S. 739 (1987).

The intention of the Three Strikes Law was to sentence repeat felony offenders to longer sentences for the purposes of both deterring criminal acts and separating dangerous individuals from society. California Penal Code §667(b); see also People v. Kilborn ,41 Cal. App. 4th 1325, 1328 (1996); People v. Cooper, 43 Cal. App. 4th' 815, 826 (1996). In petitioner's case, the law accomplished this by counting his three qualifying prior felony convictions as "strikes", thus

imposing on his current two felonies, whether serious or not[5], a minimum 25 years to life sentence on each of them. (See Cal. Pen. Code § 667 (e)(2); C.T. pp. 106-08, 189-90, 247-48.) Under Foucha, Jackson, and Salerno, above, the resulting sentence petitioner received was a rational means for achieving the legislature's objective.

In light of the foregoing, the state courts' rejection of petitioner's claim that the Three Strikes Law violates the Due Process Clause of the U.S. Constitution was reasonable and consistent with United States Supreme Court precedent.

3. Sentencing petitioner under the Three Strikes Law did not violate his right to equal protection of the laws.

Petitioner also claims that the Three Strikes Law violates his right to equal protection of the law because its application is arbitrary. (Pet., p. 6; Pts. & Auths.) The core of any federal equal protection claim is the assertion that similarly situated people are treated differently. Petitioner has not shown that the Three Strikes Law treats him differently from other felons with two prior qualifying felony convictions. A classification based on criminal record is not a suspect classification. Hunter v. Erickson, 393 U.S. 385 (1969); Levy v. Louisiana, 391 U.S. 68 (1968); Korematsu v. United States, 323 U.S. 214 (1945).

California defines the classification into which petitioner falls as recidivists with two prior qualifying felony convictions. This classification is based on petitioner's criminal record, thus it is not suspect. Hunter, id. Since the classification is not

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5. In his Traverse petitioner argues that his two current convictions were not "serious", because they involved shoplifting merchandise valued at a total of $153.54. (Trav., p. 12.) However, California Penal Code § 667(e)(2), under which petitioner was sentenced, does not require that the current convictions be "serious".

suspect, petitioner's claim should be analyzed under the rational basis test, not strict scrutiny. Hunter, id. Thus, the classification into which petitioner falls need only rest on "some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike". F.S. Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412, 415 (1920).

Since the object of the Three Strikes Law is to deter and to separate the worst felons from society, drawing the line at felons who already have two prior serious felonies is not irrational. Pell v. Procunier, 417 U.S. 817, 822-23 (1974) (state has legitimate interest in confining prisoners to deter crime and to protect society by quarantining criminal offenders until rehabilitative process can work). As discussed above, the High Court has found it rational to punish recidivists with longer sentences. See United States v. Salerno, 481 U.S. 739 (1987). Accordingly, it is reasonable under federal law for the California legislature to classify felons in this manner. Therefore, this court finds that the state courts' rejection of petitioner's equal protection claim was reasonable and consistent with United States Supreme Court precedent.

4. Sentencing petitioner under the Three Strikes Law does not constitute cruel and unusual punishment under the Eighth Amendment of the U. S. Constitution.

Lastly, petitioner claims that his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.[6]

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6. To the extent petitioner also claims that his sentence constitutes cruel and unusual punishment in violation of his state constitutional rights, petitioner has failed to state a federal question, and his claim should be dismissed. Federal habeas corpus relief is available only on behalf of a person in custody in violation of the

The Eighth Amendment does not require strict proportionality between the sentence and the crime; rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime. Harmelin v. Michigan, 501 U.S. 957 (1991) (Kennedy, J., concurring). Moreover, the United States Supreme Court has found it proper to punish defendants, not only for their current offense, but also for their recidivism.[7] Rummel v. Estelle, 445 U.S. 263, 284 (1980). The point at which to draw the line for additional punishment is "largely within the discretion of the punishing jurisdiction". Rummel, 445 U.S. at 285.[8]

The California legislature is within its rights under federal law to group repeat offenders in categories which are rationally defined, and which take into account the defendant's recidivism as a sentencing factor. Thus, any proportionality evaluation would consider, not only petitioner's current felony convictions, but his recidivist behavior as well. Under the High Court's precedents, petitioner's sentence is not "grossly disproportionate" for felony convictions with recidivist behavior indicated by three prior qualifying felonies. As such, petitioner's sentence under the Three Strikes Law does not violate the Eighth Amendment, and the state courts' conclusions to this effect were reasonable applications of federal law.

V. RECOMMENDATION

Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). See also Estelle v. McGuire, 502 U.S. 62, 68 (1991).

7. In his Traverse, petitioner concedes that he is a recidivist. (Trav., p. 13)

8. "[O]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly rare. Solem v. Helm, 463 U.S. 289-90 (quoting Rummel v. Estelle, 445 U.S. 263, 272) (emphasis omitted).

IT IS HEREBY RECOMMENDED that the Court issue (1) an Order approving and adopting this Report and Recommendation, and (2) a Judgment dismissing the Petition with prejudice.[9/]

DATED: 1-11-99

STEPHEN J. HILLMAN
UNITED STATES
MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

9. In light of this court's recommendation, petitioner's request for an evidentiary hearing is denied.

APPENDIX E

Appendix E

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	E018257
Plaintiff and Respondent,	)	
	)	(Super.Ct. No.
	)	FWV08781)
v.	)	
	)	OPINION
LEANDRO ANDRADE,	)	
	)	
Defendant and Appellant.	)	
	)	

APPEAL from the Superior Court of San Bernardino County. Joan M. Borba, Judge. (Judge of the Municipal Court, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Jerry D. Whatley, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster, Supervising Deputy Attorney General and Douglas P. Danzig, Deputy Attorney General, for Plaintiff and Respondent.

After a jury found defendant guilty of two counts of petty theft with a prior theft conviction and also returned true findings on the special allegations that defendant had two prior serious felony convictions within the meaning of Penal Code section 667, subdivisions (b) through (i), the trial court sentenced defendant to serve two consecutive terms of 25 years to life

under the Three Strikes Law.

Defendant raises numerous issues in this appeal, only two of which are directed at challenging his felony convictions. The remainder of defendant's claims, the details of which we recount below in connection with our discussion of his assertions, are directed at challenging defendant' s sentence of 50 years to life in state prison. We conclude, for reasons we explain below, that defendant's contentions all lack merit. Therefore, we will affirm the judgment.

DISCUSSION

Resolution of defendant's various contentions does not require a separate or detailed recitation of the facts surrounding defendant's crimes. Therefore, we will recount only those facts pertinent to defendant's claims and we will do so in our discussion of the pertinent issue. For our purposes, it is sufficient to note that defendant' s current convictions for petty theft with a prior theft conviction stem from two separate occasions on which defendant stole videotapes from two different K-Mart stores.

1.

INADEQUATE WAIVER OF RIGHTS IN ADMITTING PRIOR

Before trial, defendant admitted that he previously had been convicted of petty theft for purposes of the Penal Code section 666 charges. As a result of that admission, the prosecutor was precluded from presenting evidence of that prior offense to the jury. In this appeal, defendant contends his admission was invalid because the trial court did not advise him of his rights and consequently did not obtain a valid waiver of those rights as required under *In re Yurko* (1974) 10 Cal.3d 857.

In *People v. Bouzas* (1991) 53 Cal.3d 467, the Supreme Court held "that the prior conviction and incarceration requirement of [Penal Code] section 666 is a sentencing factor

for the trial court and not an 'element' of the section 666 'offense' that must be determined by a jury." *(Id.* at p. 480.) Therefore, a defendant has the "right to stipulate to the prior conviction and incarceration and thereby preclude the jury from learning of the fact of his prior conviction." *(Ibid.)* Relying on *Bouzas,* Division Four of the First District concluded in *People v. Witcher* (1995) 41 Cal.App.4th 223, "Because the prior convictions and incarcerations were not elements of the section 666 offense which the jury was required to determine, appellant's pretrial 'admission' of them was, in effect, a stipulation to their validity for the purpose of keeping them from the jury. Appellant has cited no authority for the proposition that a defendant must be admonished about his constitutional rights when he enters into such a self-serving stipulation, and we decline to create such authority. He has received the benefit of his bargain. The prosecution was not allowed to prove his prior felony convictions and incarcerations before the jury. We will not now countenance an after-the-fact contention that his stipulation did not meet minimum constitutional standards." *(Id.* at pp. 233-234.) *"Bouzas* teaches us that while priors are not an 'element' of a section 666 offense, they *do* serve to raise a petty theft to a felony with attendant penal consequences. [Citation.] Nevertheless we are not convinced that *Bouzas* or any other national or state authority requires that a stipulation for section 666 purposes demands the full panoply of constitutional admonitions required to properly admit charged prior convictions." *(Ibid.,* orig. emphasis.)

Despite defendant's urging we do otherwise, we adopt the view expressed in *People v. Witcher* and, for the reasons stated in that opinion, reject defendant's claim in this appeal.

2.

SUFFICIENCY OF THE EVIDENCE TO PROVE DEFENDANT'S PRIOR CONVICTIONS WERE BURGLARIES OF INHABITED DWELLINGS

The amended felony information alleged defendant had

three prior serious felony convictions within the meaning of Penal Code section 667, subdivisions (b) through (i) namely three residential burglary convictions on or about April 26, 1983. The evidence presented in the trial court to prove those prior convictions established that all three crimes were residential burglaries to which defendant pleaded guilty in a single proceeding. The abstract of judgment as well as the trial court's comments at defendant's sentencing hearing reflect the burglaries were all first degree. Defendant contends that evidence is insufficient to prove his prior convictions were for serious felonies within the meaning of Penal Code section 667, subdivision (d) (1) because the evidence does not establish the burglaries were of inhabited dwellings. We disagree.

The evidence presented in the trial court established defendant pleaded guilty to three counts of burglary, all three burglaries involved residences and counsel stipulated the burglaries were first degree. By definition, first degree burglary is burglary of an inhabited dwelling. (Pen. Code, § 460.) Consequently and contrary to defendant's apparent view, no other evidence was necessary to prove the burglaries were of inhabited dwellings and, therefore, serious felonies within the meaning of Penal Code section 667, subdivision (d)(1).

Accordingly, we reject defendant's challenge to the sufficiency of the evidence.

3.

SENTENCING ERROR

Defendant's remaining claims of error are all directed at his sentence of 50 years to life in state prison. As noted above, the trial court imposed that sentence, as it was required to do given defendant' s two prior serious felony convictions, under the Three Strikes Law. We first address defendant' s challenge to the trial court's imposition of two consecutive sentences of 25 years to life.

A. Consecutive Sentences

Defendant contends consecutive sentences of 25 years to life are not authorized under the Three Strikes Law. According to defendant, when a defendant is convicted of more than one current felony, as in this case, consecutive sentencing applies only to calculating defendant's minimum term of imprisonment under the alternatives set forth in Penal Code section 667, subdivisions (e)(2)(A)(i) and (iii). Defendant argues, "If those options, including imposition of consecutive terms, do not yield at least 25 years as a minimum term, then the minimum term is 25 years, under option (e)(2)(A)(ii)." In other words, defendant contends subdivision (e)(2)(A)(ii) specifies that where the greater term is 25 years to life, that is the maximum term a defendant may receive under the Three Strikes Law.

Defendant' s claim is identical to the claim addressed and rejected by the Fifth District in *People v. Ingram* (1995) 40 Cal.App.4th 1397, 1406-1409. Defendant asserts *Ingram* was wrongly decided and urges us not to follow that case. We do not share defendant' s view. It occurs to us, as it did to the court in *Ingram,* that under defendant's interpretation of subdivision (e), defendants convicted of multiple current felonies would receive the same sentence as a defendant convicted of only a single current felony. As the *Ingram* court observed, "[D]efendant's theory fails to account for all current felony offenses in arriving at the minimum term. Under his construction, a defendant currently convicted of a single residential burglary and a defendant convicted of two or even three separate residential burglaries would receive the same sentence. It would be contrary to the clear intent of the law to impose one 25-year-to-life term regardless of the number of felonies for which the defendant stands currently convicted. [¶] The language of subdivision (c)(6) is clear and unambiguous: 'If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e). '" *(People v. Ingram, supra,* 40 Cal. App.4th at 1408.) Defendant here committed two petty thefts on separate occasions after

having previously been convicted of petty theft and thereby committed two separate felonies for which the trial court correctly sentenced defendant to two consecutive mandatory minimum terms of 25 years to life in state prison for a total minimum term of 50 years.

B. Priors Must Be Brought and Tried Separately

Undaunted by the complete absence of language requiring that prior convictions for purposes of the Three Strikes Law must have been brought and tried separately, defendant contends such a requirement must be implied precisely because other recidivist statutes contain such provisions. Therefore, defendant claims he suffered only one prior serious felony conviction because, as noted above, defendant's three first degree burglary convictions all resulted from a single proceeding in which defendant pleaded guilty to numerous charges.

The precise argument defendant raises in this appeal was addressed and rejected by Division One of the First District in *People v. Allison* (1995) 41 Cal. App.3d 841, 844, 845 and Division Three of the Second District in *People v. Askey* (1996) 49 Cal. App.4th 381,386. For the reasons stated in those opinions, we reject defendant's claim in this appeal. Bluntly stated, if the Legislature had meant for prior serious or violent felony convictions to be brought and tried separately under the Three Strikes Law, it would have said so.

C. Remand for Resentencing

Defendant contends we must remand this case to the trial court for resentencing under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, in which the Supreme Court held that trial courts have discretion under Penal Code section 1385, subdivision (a) to strike prior serious felony allegations. As the Supreme Court explained, "A defendant serving a sentence under the Three Strikes law [citations] imposed by a court that misunderstood the scope of its discretion to strike prior felony

conviction allegations in furtherance of justice pursuant to section 1385(a) may raise the issue on appeal, or, if relief on appeal is no longer available, may file a petition for habeas corpus [in the sentencing court] to secure reconsideration of the sentence." *(People v. Superior Court (Romero), supra,* 13 Cal.4th at p. 530, fn. 13.)

The record in this case does not disclose the trial court' s understanding regarding its discretion to strike defendant's prior felony convictions because neither defendant nor the prosecutor raised the issue at sentencing.[1] Because defendant did not ask the trial court to exercise discretion and the trial court did not express its view in that regard, the record does not establish that the trial court misunderstood its discretion. "From a silent record, we cannot determine the sentencing court misunderstood its authority or discretion. 'We must indulge in every presumption to uphold a judgment, and it is defendant's burden on appeal to affirmatively demonstrate error -- it will not be presumed. [Citation.]' [Citations.]" *(People v. White Eagle* (1996) 48 Cal. App.4th 1511, 1523.) We find no error on this silent record. Defendant's recourse, therefore, is to pursue this claim by way of a petition for writ of habeas corpus in the trial court.

Defendant also contends we must remand this case for resentencing not only to allow the trial court to exercise discretion to strike one or more of defendant's prior felony convictions but also to exercise discretion to impose misdemeanor sentences on defendant's petty theft convictions.

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1. As the Attorney General points out, defendant did file a pretrial motion to strike defendant's prior serious felony convictions. While that motion was founded on numerous claims, the trial court' s discretion to strike the prior serious felony convictions was not one of them. Consequently, in denying that motion without prejudice, as the trial court did here, the trial court did not expressly or impliedly reveal its view with respect to its discretion to strike prior felony convictions under the Three Strikes Law. Defendant did not renew his motion to strike the prior serious felony allegations at his sentencing hearing.

Defendant raised this issue in the trial court on March 20, 1996, when, after the prosecution rested its case, defendant made an oral "17(b)(4) motion" which the trial court immediately denied, without discussion.

As with defendant' s claim under *People v. Superior Court (Romero)* the record here does not establish that the trial court was unaware of its power to reduce a so-called wobbler felony to a misdemeanor under Penal Code section 17. While the Supreme Court recently resolved this issue favorably to defendant in *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, at the time defendant made his motion in March of 1996, several appellate courts also had adopted the position advanced by defendant in this appeal. (See *People v. Trausch* (1995) 36 Cal. App.4th 1239; *People v. Vessell* (1995) 36 Cal. App.4th 285; *People v. Superior Court (Perez)* (1995) 38 Cal. App.4th 347; *People v. Dent* (1995) 38 Cal.App.4th 1726.) Here, unlike the *Romero* issue where we declined to presume error from a silent record, we must presume the trial court was aware of the cited authority and therefore declined to exercise its power under Penal Code section 17 to reduce the wobbler felonies to misdemeanors.[2/] Accordingly, we must reject defendant' s request that we remand this matter for resentencing. In doing so, we do not intend to preclude the trial court, should it determine to reconsider defendant's sentence under the habeas corpus procedure, from exercising discretion under Penal Code section 17. We hold here only that we will not remand this case to the trial court for resentencing on that issue.

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2. To support his claim that trial courts were uncertain whether they could reduce a third strike wobbler felony to a misdemeanor at the time of his sentencing, defendant requests, in a separately filed motion, that we take judicial notice of an appeal by the Santa Barbara County District Attorney. Defendant's request for judicial notice is denied. The fact defendant seeks to establish by his judicial notice request is established by other sources, namely the cases cited, above, in our discussion.

D. Cruel and Unusual Punishment

Defendant contends his sentence of 50 years to life in state prison violates both the state and federal constitutional prohibitions against cruel and unusual punishment. While the sentence is severe, we must reject defendant's cruel and unusual punishment claim.

Defendant does not expressly discuss the Eighth Amendment to the Federal Constitution. However, to the extent defendant suggests that the proportionality analysis applies under both the state and federal constitutions, we must question that assertion. As Division One of this court noted recently in *People v. Ayon* (1996) 46 Cal. App.4th 385, the current validity of the Solem proportionality analysis is questionable in light of *Harmelin v. Michigan* (1991) 501 U.S. 957, "the high court's most recent statement on whether the Eighth Amendment to the United States Constitution includes a proportionality guarantee in a noncapital case." *(People v. Ayon, supra,* 46 Cal.App.4th at pp. 396-397.) *"Both in this jurisdiction and in other jurisdictions, habitual offender statutes have long withstood the constitutional claim of cruel and/or unusual punishment.* [Citations.] The United States Supreme Court addressed the constitutionality of a Texas recidivist statute requiring life imprisonment upon conviction of a third felony in *Rummel v. Estelle* [1980] 445 U.S. 263. Over the course of nine years, Rummel had been convicted of fraudulently using a credit card to obtain $80 worth of goods or services, passing a forged check in the amount of $28.36 and obtaining $120.75 by false pretenses. [Citation.] In response to Rummel's argument that life imprisonment was 'grossly disproportionate' to the three felonies he had committed, the high court concluded the mandatory life sentence did not constitute cruel and unusual punishment under the Eighth and Fourteenth amendments. [Citation.]" *(People v. Ayon, supra,* 46 Cal.App.4th at p. 397, orig. emphasis.) Defendant here was convicted of committing two petty thefts, both elevated to felonies by a 1990 petty theft conviction, after having committed three residential burglaries in 1983. Comparing defendant's crimes and criminal history

with that of defendant Rummel, we cannot say the sentence of 50 years to life at issue in this case is disproportionate and constitutes cruel and unusual punishment under the United States Constitution.

As the Supreme Court explained in *People v. Dillon* (1983) 34 Cal.3d 441, under the California Constitution, "a statutory punishment may violate the constitutional prohibition [against cruel and unusual punishment] not only if it is inflicted by a cruel or unusual method, but also if it is grossly disproportionate to the offense for which it is imposed." *(Id.* at p. 478.) "A penalty offends the proscription against cruel and unusual punishment when it is 'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" *(People v. King* (1993) 16 Cal.App.4th 567, 571, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424.) "A tripartite test has been established to determine whether a penalty offends the prohibition against cruel and unusual punishment. First, courts examine the nature of the offense and the offender, 'with particular regard to the degree of danger both present to society.' Second a comparison is made of the challenged penalty with those imposed in the same jurisdiction for more serious crimes. Third, the challenged penalty is compared with those imposed for the same offense in other jurisdictions. [Citations.]" *(People v. King, supra,* 16 Cal. App.4th at p. 572, citing *In re Lynch, supra,* 8 Cal.3d at pp. 425-427; *In re Reed* (1983) 33 Cal.3d 914, 923; and *People v. Hernandez* (1985) 169 Cal. App.3d 282, 288.)

With respect to the first factor noted above, defendant asserts the punishment of 50 years to life is grossly disproportionate to the severity of the two petty thefts defendant committed. We agree the sentence is disproportionate to defendant's criminal culpability when considered in the abstract. When viewed in the context of defendant's criminal record, not only his prior burglary convictions but also his later convictions for transporting marijuana in 1988 and 1990 as well as the fact that he only had been paroled in 1993, we cannot say the punishment is grossly disproportional so as to shock the conscience and thereby violate the state constitutional

prohibition against cruel and unusual punishment.

In addressing the second factor, that defendant' s punishment is more severe than that prescribed for more serious offenses in California, defendant focuses only on his current offenses of petty theft and compares them with the sentence imposed for "cold-blooded, premeditated murder." However, the comparison is inapt because it does not take defendant's recidivism into consideration. The only appropriate comparison is with punishment imposed for recidivists like defendant. In our view, because all three strikes defendants are punished in the same manner, this second factor effectively is irrelevant.

In addressing the third factor, that defendant's punishment under the Three Strikes Law is more severe than that imposed for similar offenses in other jurisdictions, defendant recounts the numerous differences between California's statute and recidivist laws in other states. We will not recount the catalogue of differences defendant cites but, instead, will accept his representation that only Texas has a recidivist statute comparable in severity to California's Three Strikes Law. That representation notwithstanding, it is apparent from defendant's discussion that numerous other states have laws which impose severe punishments on repeat felony offenders. We cannot say the differences between California's statute and those in other states are so extreme that California's law "strikes a discordant note. . . ." *(In re Lynch, supra,* 8 Cal.3d at p. 436.) "The purpose of a recidivist statute. . . [is] to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." *(Rummel v. Estelle,*

supra, 445 U.S. at pp. 284-285.)

In short, and in summary, we must reject defendant's assertion that his sentence in this case constitutes cruel and unusual punishment in violation of either the state or federal constitutional prohibitions.

E. Vagueness

Defendant contends, albeit as two separate issues, that the Three Strikes law is unconstitutionally vague on its face and as applied to defendant. We address both claims in this section of our discussion.

Defendant contends the Three Strikes Law is unconstitutionally vague on its face because it is ambiguous in numerous respects, examples of which include (1) the phrase "upon the date of conviction" as used in subdivision (d)(1) regarding pre-March 7, 1994, prior felony convictions and (2) the word "term" as used in subdivision (e).

Several recent cases have addressed and rejected these precise claims as well as other assertions regarding purported unconstitutional ambiguities in the Three Strikes Law. For the reasons stated in *People v. Sipe* (1995) 36 Cal.App.4th 468, 479-482 and *People v. Hamilton* (1995) 40 Cal.App.4th 1615, 1618-1619, we reject defendant's claim in this appeal.

We likewise reject defendant's assertion that the statute is vague and therefore unconstitutional as applied to him. On this point defendant contends the law is vague as applied to him because he could not determine whether his prior burglary convictions, which were not brought and tried separately, constituted only one prior conviction or multiple prior convictions. This claim is merely a different articulation of defendant's assertion, previously addressed and rejected above, that in order to constitute "strikes," prior convictions must be brought and tried separately. We will not address defendant's claim because we have already done so. For the reasons set out above, the Three Strikes Law does not require prior convictions be brought and tried separately. Therefore, we reject defendant's assertion that the statute is unconstitutionally vague as applied

to defendant. Simply put and contrary to defendant's arguments, the Three Strikes Law is clear on this point.

F. Separation of Powers

As his final claim in this appeal, defendant contends the Three Strikes Law is unconstitutional because it requires the prosecutor to plead and prove all prior serious felony convictions and thereby violates the separation of powers doctrine. Defendant concedes this issue was addressed and rejected in *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1332-1333. Defendant argues *Kilborn* is wrongly decided. We do not share defendant's view. Instead, we find the reasoning persuasive. Therefore, we reject defendant's claim in this appeal for the reasons stated in *People v. Kilborn, supra.*

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION.

McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

McDANIEL
J*

* Retired Associate Justice of the Court of Appeal, Fourth District, sitting under assignment by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX F

Appendix F

[Filed July 23, 1997]

Fourth Appellate District, Division Two, No. E018257
S062030

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Respondent

v.

LEANDRO ANDRADE, Appellant

Appellant's petition for review DENIED without prejudice to filing a petition for writ of habeas corpus in the sentencing court. (See People v. Superior Court (Romero) 1996) 13 Cal.4th 497, 530, fn. 13.)

GEORGE /s/
Chief Justice

EDITOR'S NOTE

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FILED
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No. 01-1127

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2001

BILL LOCKYER, Attorney General of the State of California; ERNEST B. ROE, Warden, Petitioners-Appellees,

v.

LEANDRO ANDRADE, Respondent-Appellant

MOTION OF LEANDRO ANDRADE, RESPONDENT-APPELLANT, TO PROCEED *IN FORMA PAUPERIS*

The respondent, Leandro Andrade, asks leave to proceed *in forma pauperis* and to file the attached Brief in Opposition to Petition for Writ of Certiorari. Andrade is serving a sentence of 50 years to life in California prison. He filed a pro se habeas corpus petition in the United States District Court for the Central District of California. He filed a pro se appeal to the United States Court of Appeals for the Ninth Circuit. He was granted *in forma pauperis* status.

The Ninth Circuit, pursuant to 28 U.S.C. §1915(e)(1), appointed Erwin Chemerinsky to represent Andrade in briefing and arguing the case. Erwin Chemerinsky, a member of the Bar of this Court, has agreed to continue to represent Andrade, without charge, through the remainder of proceedings concerning this matter. No affidavit is attached because the United States Court of Appeals appointed counsel in this matter.

Respectfully submitted,
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(213) [illegible]

22 pp

Certificate of Service

I, Erwin Chemerinsky, a member of the Bar of this Court, hereby certify that on the 26th day of February 2002, three copies of the **MOTION OF LEANDRO ANDRADE, RESPONDENT-APPELLANT, TO PROCEED *IN FORMA PAUPERIS*** were mailed, first class postage prepaid, to:

Mr. Douglas P. Danzig
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No. 01-1127

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2001

BILL LOCKYER, Attorney General of the State of California; ERNEST B. ROE, Warden, Petitioners-Appellees,

v.

LEANDRO ANDRADE, Respondent-Appellant

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a sentence of 50 years to life in prison, with no possibility of parole for at least 50 years, grossly disproportionate in violation of the Eighth Amendment and a violation of clearly established law when it is applied for stealing videotapes worth $153.54?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Leandro Andrade hereby opposes the Petition for a Writ of Certiorari by Petitioner Bill Lockyer, Attorney General of the State of California, to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Respondent adopts and incorporates by reference all opinions and orders below that are set forth in Petitioner's Brief in Appendices A through F, at pages 2 through 81.

STATEMENT OF THE CASE

The facts are not in dispute in this matter. Appellant Leandro Andrade was convicted on two counts of petty theft with a prior conviction; each was for stealing videotapes worth less than $100 from a K-Mart. He was sentenced to 25 years to life in prison on each count, to be served consecutively. He is thus serving a sentence to 50 years to life in prison for his theft of videotapes. He is not eligible for consideration for parole until he serves at least 50 years, or until the year 2046. App. A, at 6.* Andrade was 37 years old at the time his sentence was imposed; he thus will not be eligible for parole until he is 87. App. A, at 28.

The first count was based on thefts that occurred on November 4, 1995, at the K-Mart store in Ontario, California. The store's Loss Prevention Officer observed Andrade steal five videotapes worth a combined value of $84.70. Andrade was

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*All citations to the Ninth Circuit's decision in this case are to the copy of it found in Appendix A filed by the petitioner.

stopped as he was leaving the store and the videotapes were taken from him. App. A, at 11.

The second count was based on thefts that occurred on November 18, 1995, at the K-Mart store in Montclair, California. The store's Loss Control Manager observed Andrade stealing videotapes. After being stopped, Andrade surrendered four videotapes with a combined value of $68.84. App. A, at 11.

Under California law, this generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. California Penal Code Ann. §490 (West Supp. 1998).

California law, however, provides that petty theft with a prior conviction is a felony offense. California Penal Code Ann. §666. Because Andrade had at least two prior convictions, his petty theft was prosecuted and convicted as a felony. Andrade's prior offenses that were considered by the state trial court were three counts of residential burglary committed on the same day in 1983, 13 years prior to the shoplifting that was the basis for the current convictions and sentence. App. D., at 59. As the Ninth Circuit noted, "All of [Andrade's prior] offenses were non-violent." App. A, at 32.

Under California's "three strikes" law, each act of shoplifting videotapes by Andrade was the basis for imposing a sentence of 25 years to life in prison. California Penal Code Ann. §667(e)(2)(A). Andrade is now serving two consecutive sentences of 25 years to life in prison, one for each act of

stealing videotapes. As the Ninth Circuit observed, "As a result, Andrade, a non-violent recidivist who twice shoplifted merchandise worth a total of $153.5, received a life sentence in prison with no possibility of parole for 50 years." App. A, at 6.

The California Court of Appeal, Fourth Appellate District, Division Two, affirmed the judgment, finding that the sentence did not violate the Eighth Amendment's prohibition of cruel and unusual punishment. Appendix E. The California Supreme Court denied review. Appendix F.

Andrade then filed pro se a timely petition for habeas corpus pursuant to 28 U.S.C. §2254, which was denied. Andrade filed a pro se appeal to the denial to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit appointed counsel to brief and argue the case on Andrade's behalf and rendered its decision on November 2, 2001, finding that the sentence of 50 years to life in prison for shoplifting a small amount of merchandise was grossly disproportionate and violated the Eighth Amendment. The Ninth Circuit reversed the judgment of the district court and remanded the case with instructions to issue the writ of habeas corpus within 60 days following the issuance of the mandate unless the State resentences Andrade. App. A, at 43-44. The court then granted the State's motion to stay this mandate pending review by the Supreme Court.

REASONS THE PETITION SHOULD BE DENIED

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR THE STATES AS TO WHETHER A SENTENCE OF 50 YEARS TO LIFE IN PRISON FOR MISDEMEANOR CONDUCT IS GROSSLY DISPROPORTIONATE IN VIOLATION OF THE EIGHTH AMENDMENT

The indeterminate life sentence imposed on Leandro Andrade for misdemeanor conduct, shoplifting a small amount of merchandise, is a result of laws that are unique to California. California essentially "double counts" the prior offenses. Under California law, Andrade's conduct generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. California Penal Code Ann. §490 (West Supp. 1998). Because of his prior offenses, Andrade's misdemeanor conduct, petty theft, is converted by statute into a felony, "petty theft with a prior conviction." California Penal Code Ann. §666. Then, under California's Three Strikes Law, that felony is used to impose a sentence of 25 years to life in prison on each count. In other words, the prior offenses are used twice: first to convert a misdemeanor into a felony and then to impose a life sentence based on it being a felony.

No other state in the country has such a sentencing scheme where misdemeanor conduct can be the basis for an indeterminate life sentence. See People v. Dozier, 93 Cal.Rptr. 600, 605-606 (2000) (a sentence under the Three Strikes law is, under California law, an "indeterminate life sentence.") As Justice Stevens noted: California is the "only state in the country in which a misdemeanor could receive such a severe sentence." Riggs v. California, 525 U.S. 1114 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). The Ninth Circuit carefully reviewed the recidivist sentencing schemes throughout the country and concluded: "Of those jurisdictions with some form of recidivist sentencing statute, the State suggests only four where Andrade's triggering offense (petty theft with a prior) could qualify for recividist sentencing: Rhode Island, West Virginia, Texas, and Louisiana. Even in those four states, however, Andrade could not receive a sentence nearly as severe as he did under California's Three Strikes Law on the basis of his two prior strikes for residential burglary." App. A, at 35.

There is thus no conflict among the Circuits or among the states -- and no possibility of a conflict -- as to whether a sentence such as Andrade's violates the Eighth Amendment. Indeed, to the extent that other states previously allowed misdemeanor conduct to be the basis for a life sentence, this has been declared unconstitutional. For example, in People v. Gaskins, 923 F.2d 292 (Colo. App. 1996), the Colorado court found that it violates the United States Constitution to impose a life sentence for misdemeanor conduct, even if there have been prior felony convictions.

II. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT APPLIED CLEARLY ESTABLISHED LAW IN FINDING THAT A SENTENCE OF 50 YEARS TO LIFE IN PRISON FOR SHOPLIFTING A SMALL AMOUNT OF MERCHANDISE IS GROSSLY DISPROPORTIONATE IN VIOLATION OF THE EIGHTH AMENDMENT

The Ninth Circuit's decision was quite narrow. The court was clear that its "decision does not invalidate California's Three Strikes Law generally. Rather, we conclude that it is unconstitutional only as applied to Andrade because it imposes a sentence grossly disproportionate to his crimes." App. A., at 7." The Ninth Circuit's ruling is limited to the facts of this case, holding only that it violates the Eighth Amendment to sentence a person, who never has been convicted of a violent crime, to 50 years to life in prison for stealing $153 worth of videotapes.

The State's petition for certiorari argues that the law is uncertain as to whether grossly disproportionate punishments violate the Eighth Amendment in non-capital cases. Petition for Writ of Certiorari, at 7. However, the Ninth Circuit's decision rests on the firmly established principle that grossly disproportionate punishments violate the cruel and unusual punishment clause of the Eighth Amendment. In Weems v. United States, 217 U.S. 349, 371 (1910), this Court held that the Eighth Amendment prohibits "greatly disproportioned" sentences. On many other occasions, this Court has declared sentences unconstitutional as being "grossly disproportionate." In Solem v. Helm, 463 U.S. 277, 288 (1983), the Court observed that "the Court has continued to recognize that the Eighth Amendment prohibits grossly disproportionate punishments."

In Harmelin v. Michigan, 501 U.S. 957 (1991), seven Justices expressly recognized that grossly disproportionate sentences are unconstitutional. In Harmelin, Justice Scalia argued that the Eighth Amendment does not prohibit disproportionate sentences. Id. at 985. However, only Chief Justice Rehnquist joined this part of Justice Scalia's opinion.

Justice Kennedy, concurring in part and concurring in the judgment, expressly disagreed with Justice Scalia, and declared: "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme

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"In its petition, the State of California suggests that review is appropriate because Andrade will unleash a floodgate of habeas petitions by California prisoners. Petition for a Writ of Certiorari, at 7 n.1. The State bases this entirely on newspaper stories about the Andrade decision.

The State's concern is unfounded. According to the most recent statistics from the California Department of Corrections, 340 people are incarcerated in California whose third strike was "petty theft with a prior." Department of Corrections, State of California, Data Analysis Unit, Estimates of Statistical Analysis Section, Offender Information Service Bureau, "Second and Third Strikes in the Institution Population By Offense Group and Admission of Return Status," September 10, 2001. Some of these individuals might be procedurally barred from seeking relief because of factors such as the statute of limitations on bringing habeas corpus petitions, the bar on successive petitions, and exhaustion requirements. Thus, although accepting Appellants position undoubtedly would benefit some other prisoners, this is not likely to be a large number.

Nor is there reason to believe that Andrade will increase habeas petitions by those convicted of other crimes. The reality is that prisoners already are filing such petitions and there is no indication that Andrade, which is limited to its facts, will in any way increase their numbers.

sentences that are 'grossly' disproportionate to the crime." Id. at 1001 (Kennedy, J., concurring in part and concurring in the judgment). Justices O'Connor and Souter joined this opinion and its conclusion that grossly disproportionate punishments are unconstitutional. The four dissenting Justices in Harmelin, actually the plurality in the case, argued that the Eighth Amendment prohibits disproportionate sentences and contended that "gross disproportionality" was too restrictive a constitutional standard. Id. at 1009, 1012 (White, J., dissenting); id. at 1027 (Marshall, J., dissenting).

No decision since Harmelin has questioned the principle established by almost a century of Eighth Amendment decisions: grossly disproportionate punishments are cruel and unusual punishment in violation of the Eighth Amendment. In fact, in United States v. Bajakajian, 524 U.S. 321, 336 (1998), this Court, in invalidating a forfeiture as violating the Eighth Amendment, stated: "[W]e therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clauses precedents."

Simply put, if any sentence is "grossly disproportionate," it is an indeterminate life sentence, with no possibility of parole for 50 years, for stealing $153 worth of videotapes. The Ninth Circuit followed this Court's command that proportionality is to be determined by "objective factors to the maximum extent possible." Rummel v. Estelle, 445 U.S. 263, 274-275 (1980). Specifically, the Ninth Circuit expressly applied the test articulated by this Court in Solem v. Helm, 463 U.S. 277, 292 (1983): "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

Under this test, the Ninth Circuit properly found that an indeterminate life sentence imposed on Andrade for shoplifting violates the Eighth Amendment. First, the Court compared the gravity of the offense and the harshness of the punishment. The offenses were minor, petty theft, but the punishment was enormous: a sentence of 50 years to life in prison. Andrade's crimes were neither violent nor in any way dangerous; indeed, Andrade never has been convicted of any violent crime. App. A., at 6. In fact, the stolen items were recovered at the time of the shoplifting and there was no loss to the stores. The total value of the stolen items was well below the dividing line distinguishing petty theft from grand theft. This is different, for example, from Harmelin v. Michigan where Justice Kennedy emphasized that the offense, possession of 650 grams of cocaine, "threatened to cause great harm to society" because it could "yield . . . between 32,650 and 65,000 doses" of a drug that threatened "the health and welfare of our population." Harmelin v. Michigan, 501 U.S. at 1002.

Moreover, in assessing the gravity of the punishment, the

Ninth Circuit stressed that "[u]nlike most sentences imposed under California's sentencing laws, Andrade's minimum three-strikes term may not be reduced by credit for good behavior or working while in prison. Andrade therefore must serve a minimum of 50 years in prison before he is eligible for parole." App. A, at 28. The Ninth Circuit explained that the unavailability of parole for at least 50 years makes the punishment substantially more severe than the sentence at issue in Rummel because there the defendant was eligible for parole in as few as 12 years. App. A., at 28.

The Ninth Circuit then properly applied the second factor from the Solem test: the sentences imposed on others in the same jurisdiction for similar offenses. Under California law, Andrade's crimes constituted petty theft, a misdemeanor punishable by a fine or a jail sentence of six months or less. California Penal Code Ann. §490 (West Supp. 1998). The court emphasized that "it is significant that the core conduct for which Andrade was sentenced is, in the first instance, classified as a misdemeanor rather than a felony." App. A, at 30. Indeed, the Ninth Circuit noted that "Andrade's indeterminate sentence of 50 years to life is exceeded in California only by first-degree murder and a select few violent crimes." App. A, at 33.

Finally, the Ninth Circuit applied the third Solem factor in evaluating gross disproportionality: the sentences imposed in other jurisdictions. As explained above, California is the only state in which misdemeanor shoplifting could lead to an

indeterminate life sentence with no possibility of parole for 50 years. The Ninth Circuit reviewed the other states and concluded "only in Louisiana is it possible for Andrade to receive a comparable sentence. Even then, the sentence would be vulnerable to a challenge under the Louisiana constitution." App. A, at 36. The Ninth Circuit noted that the fact that Andrade could receive such a sentence at most in only one other state supports its conclusion that the punishment was grossly disproportionate.

The State in its petition for certiorari emphasizes that the government has the constitutional authority to punish recidivists harshly. This is true, but this Court never has approved such harsh sentences for misdemeanor conduct, even when the offender is a recidivist. The distinction between misdemeanors and felonies is deeply embedded in the law. The Supreme Court recently recognized the fundamental historical difference between felony and misdemeanor conduct. In Apprendi v. New Jersey, 120 S.Ct. 2348, 2357 n.7 (2000), the Court observed that "[t]he common law punishment for misdemeanors -- those smaller faults, and omissions of less consequence" did not include prison sentences. The Court stated that "[a]ctual sentences of imprisonment for such offenses, however, were rare at common law until the 18th century for 'the idea of prison as a punishment would have seemed an absurd expense.'" Id. at 2357 n.7 (citations omitted).

In Rummel v. Estelle, this Court repeatedly emphasized that it was considering permissible punishment for felony conduct.

See 445 U.S. at 274, 278, 284. In fact, the Court stressed the "line dividing felony theft from petty larceny." Id. at 284. Rummel involved felony theft, while these cases concern what California deems to be petty theft.

Justice Stevens recently explained the importance of this distinction: "While this Court has traditionally accorded to state legislatures considerable (but not unlimited deference) to determine the length of sentences 'for crimes concededly classified and classifiable as felonies,' petty theft does not fall into that category." Riggs v. California, 525 U.S. at 1114 (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). Indeed, Justice Stevens said that punishing petty theft with a prior conviction by imposing a life sentence is closely analogous to the punishment declared unconstitutional in Solem: "[P]etty theft has many characteristics in common with the crime for which we invalidated a life sentence in Solem, uttering a 'no account' check for $100. 'It involves neither violence nor (the) threat of violence to any person'; the amount of money involved is relatively small; and the State treats the crime as a felony (here, only under some circumstances) pursuant to a quirk in state law." Id. at 1114 (citations omitted).

In Harmelin v. Michigan, Justice Scalia, joined only by Chief Justice Rehnquist, recognized the possibility of "extreme examples" of very harsh punishments for relatively trivial offenses, but said that "they are certain never to occur." 501 U.S. at 985-986. But that is exactly what occurred in this case: Leandro Andrade was sentenced to life imprisonment for shoplifting.

The State in its petition for certiorari repeatedly emphasizes that the California legislature and the voters of California through an initiative approved the Three Strikes law. Petition for Writ of Certiorari, at 12-13. But there is no limit to the State's argument. Under its reasoning, any punishment approved by the legislatures and the voters for any crime, no matter how trivial, would be constitutionally permissible. Under the State's position, the government could, if it chose, impose a life sentence for a traffic ticket, jaywalking, littering, or literally any offense no matter how trivial. This is inconsistent with almost a century of decisions from this Court that grossly disproportionate punishments violate the Eighth Amendment.

The Ninth Circuit's decision is very narrow. It applies well established law and finds only that California's Three Strikes law is unconstitutional as applied to this defendant who received the extraordinary sentence of 50 years to life in prison for stealing $153 worth of videotapes.

III. THE SENTENCE OF 50 YEARS TO LIFE IN PRISON IMPOSED ON LEANDRO ANDRADE VIOLATES CLEARLY ESTABLISHED CONSTITUTIONAL PRINCIPLES AND THUS RELIEF IS APPROPRIATE UNDER A WRIT OF HABEAS CORPUS

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may grant relief is the state court's

decision is "contrary to, or involves an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). This Court has stated that the standard for relief is whether the sentence is "contrary to . . . clearly established federal law, as determined by the Supreme Court of the United States" or that it was an "unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Williams v. Taylor, 120 S.Ct. 1495, 1423 (2000). The Ninth Circuit expressly relied on the standard set out in Williams v. Taylor and quoted at length from Justice O'Connor's opinion. App. A, at 18-19.

The Ninth Circuit granted relief because its review of the this Court's decisions in Rummel, Solem, and Harmelin "demonstrates that the law governing the application of the Eighth Amendment to non-violent offenders sentenced to life imprisonment was clearly established at the time of the California Court of Appeal's 1997 decision in this case." App. A, at 41. The Ninth Circuit noted that the California Court of Appeal failed to apply the test adopted by this Court in Solem v. Helm and supported by seven members of this Court in Harmelin v. Michigan. The Ninth Circuit found that the state court's "disregard for Solem results in an unreasonable application of clearly established Supreme Court law." App. A, at 42

Thus, the Ninth Circuit applied clearly established law -- that grossly disproportionate punishments violate the Eighth Amendment -- to conclude that sentence a person for 50 years to life in prison for shoplifting $153 worth of merchandise is unconstitutional. This is completely in accord with when federal courts may grant relief under the habeas corpus statute."[***] This case presents no new issues with regard to the habeas corpus statute or how it should be interpreted and applied.

Conclusion

For the foregoing reasons, respondent Leandro Andrade urges this Court to deny the petition for a writ of certiorari.

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[***]The state in its petition for certiorari also raises an issue concerning the appropriate methodology for habeas corpus review. Petition for Writ of Certiorari, at 20. However, the state never explains why the choice of methodology would matter at all in this case. The Ninth Circuit found that the sentence imposed on Andrade, 50 years to life in prison, was contrary to clearly established law. This is exactly the test prescribed in the statute and elaborated upon in Williams v. Taylor and Penry v. Johnson. [illegible]

Certificate of Service

I, Erwin Chemerinsky, a member of the Bar of this Court, hereby certify that on the 26th day of February 2002, three copies of the Brief in Opposition to Petition for Writ of Certiorari, were mailed, first class postage prepaid, to:

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No. 01-1127

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IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; ERNEST B. ROE, Warden, *Petitioners-Appellees,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether California's Three-Strikes Law, providing for a twenty-five years-to-life prison term for a third strike conviction, violates the Eight Amendment's prohibition against cruel and unusual punishment when applied to a defendant whose third strike is for petty theft with a prior theft-related conviction?

2. Whether, in light of this Court's existing jurisprudence concerning the Eighth amendment and proportionality in non-capital cases, the judgment of the California Court of Appeal, holding Andrade's consecutive twenty-five years-to-life sentences for convictions on two counts of petty theft with a prior, involved an unreasonable application of clearly established federal law as determined by this Court, within the meaning of 28 United States Code section 2254(d)(1)?

3. Whether the Ninth Circuit or the Fourth Circuit is correct, concerning the necessity for a habeas court analyzing a claim under the Antiterrorism and Effective Death Penalty Act of 1996, Pub, L. No. 104-132, 110 Stat. 1214, to first decide if the state court's determination was erroneous before deciding whether the determination was contrary to, or involved an unreasonable application of, clearly established federal law as determined by this Court?

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IN THE SUPREME COURT OF THE UNITED STATES

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BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; ERNEST B. ROE, Warden, *Petitioners-Appellees,*

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LEANDRO ANDRADE, *Respondent-Appellant.*

ARGUMENT

I.

THE NINTH CIRCUIT'S RECENT DECISION IN THE CONSOLIDATED CASES OF *BROWN V. MAYLE* AND *YLST V. BRAY* SUPPORTS GRANTING THE PETITION FOR WRIT OF CERTIORARI

On January 29, 2002, this Court docketed Petitioner-Appellee's Petition for Writ of Certiorari in the instant matter (hereafter *Andrade*).[1/] On February 7, 2002, the Ninth Circuit issued its opinion in the consolidated cases of *Brown v. Mayle*,

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1. On March 1, 2002, Respondent-Appellant filed a brief in opposition. On March 13, 2002, the Petition was distributed for conference on March 29, 2002.

and *Ylst v. Bray*, 2002 WL 187415 (9th Cir. 2002) (hereafter *Brown/Bray*). (Supplemental App.) The Ninth Circuit's opinion in *Brown/Bray* followed, and expanded upon, its opinion in *Andrade v. Attorney General of State of California*, 270 F.3d 743 (9th Cir. 2001). Petitioner respectfully submits, the *Brown/Bray* opinion further demonstrates why certiorari should be granted in this case.

In *Andrade*, the Ninth Circuit held the Eighth Amendment prohibited punishing defendant Andrade by a sentence of fifty years to life for his two current convictions for petty theft with a prior theft-related conviction and time served (Cal. Penal Code, §§ 484, subd. (a), 486, and 666), where his criminal history consisted solely of non-violent offenses. The Ninth Circuit reasoned that the sentence was a much harsher penalty than the sentence in *Rummel v. Estelle*, 445 U.S. 263 (1980), because Rummel would have been eligible for parole in twelve years or less. The court in *Andrade* analogized the penalty to the sentence of life without possibility of parole in *Solem v. Helm*, 463 U.S. 277 (1983). Focusing on the "latest crime," *Andrade* concluded that shoplifting nine videotapes was comparable to the offense in *Solem* of uttering a no-account check. *Andrade* stated that since "the core conduct for which Andrade was sentenced is, in the first instance, classified as a misdemeanor rather than a felony," using petty theft with a prior theft conviction to serve as the third strike creates a "unique quirk," allowing a defendant's recidivism to be "double counted." Finally, the *Andrade* court noted that "[w]hile the Supreme Court frequently defers to legislative judgments regarding the proper length of imprisonment for felony offenses, it is less clear that the same degree of deference is appropriate when extreme sentences are imposed for misdemeanor conduct." *Andrade*, 270 F.3d at 760.

In *Brown/Bray*, separate juries convicted each defendant of petty theft with a prior. Prior strike allegations against each defendant were also found true. The trial court

sentenced each defendant to prison for indeterminate terms of twenty-five-years-to-life, in accordance with California's Three-Strikes Law (Cal. Penal Code § 667, subds. (b) through (i)). Bray's prior strikes consisted of four robbery convictions. Two of them arose from one incident, in which Bray and a co-defendant stole a purse and a briefcase from the driver of a car. When the victim grabbed Bray, the co-defendant pointed a gun at her head and threatened to kill her if she did not let go. The victim complied, but the co-defendant fired three shots as the perpetrators fled the scene. In the third robbery conviction, Bray and several co-defendants approached the victim and demanded his watch. One co-defendant hit the victim in the face and took the victim's watch, a second co-defendant kicked the victim in the face when the victim fell to the ground and took five dollars cash. The *Brown/Bray* opinion does not specify the facts of Bray's fourth robbery conviction. It merely states that in 1987 Bray was again convicted of robbery. The opinion does not specify the facts underlying Brown's prior strikes either. It merely states Brown had five prior strikes, consisting of two second degree burglary convictions, two assault with a deadly weapon convictions, and a robbery conviction. (Supplemental App. at 5-6.)

The Ninth Circuit's opinion in *Brown/Bray* found the sentences in both cases violated the Eighth Amendment's prohibition against cruel and unusual punishment. The court found an inference of gross disproportionality, analyzed Brown's and Bray's cases from an intrajurisdictional and interjurisdictional perspective, and concluded they were materially indistinguishable from *Andrade*. Noting that the *Andrade* court held a sentence of fifty-years-to-life was grossly disproportionate to the crime and that the state court of appeal ruling was contrary to or an unreasonable application of this Court's clearly established precedent, the court in *Brown/Bray* held that although the circumstances before the court varied from *Andrade* in several respects, none of those differences

justified a different result than the one reached in *Andrade*. The Ninth Circuit rejected the state's argument that *Andrade* did not apply because the sentence was only half as long as the sentence in *Andrade*. The court said that if fifty-years-to-life in *Andrade* for two separate convictions was grossly disproportionate, it follows that twenty-five-years-to-life for one conviction was also grossly disproportionate. The *Brown/Bray* court further reasoned that although *Andrade* mentioned the petitioner's age at a possible parole date, the court in *Andrade* could not have meant the same sentence would have been acceptable for a younger person, or that a person with a limited life expectancy is entitled to a shorter sentence. The court said that the *Andrade* court's mention of the fact that Andrade could die before completing his sentence simply underscored the length of the mandatory sentence. (Supplemental App. at 18-30.)

The court also found it insignificant that both Brown and Bray had extensive criminal histories that included crimes of violence, stating that "the presence of violent prior offenses might well be of great significance were the crime of conviction a violent crime, but cannot be where the crime of conviction is non-violent." The court concluded that a twenty-five-years-to-life sentence for a defendant convicted of petty theft with a prior is cruel and unusual punishment, regardless of whether the defendant has an extensive criminal history that includes repeated crimes of violence and other offenses that have harsh potentialities for violence. The court also held that the state courts' rulings upholding the sentences were "contrary to" and "unreasonable application[s] of" clearly established United States Supreme Court precedent within the meaning of section 2254(d)(1). (Supplemental App. at 31-37.)

As is plainly evident, much like the opinion in *Andrade*, the *Brown/Bray* opinion is a result-oriented decision. Moreover, it demonstrates the Ninth Circuit is using *Andrade* as a springboard to deviate even further from both this Court's relevant decisions and the standard of review prescribed by

Congress for federal habeas cases reviewed pursuant to 28 United States Code section 2254. Despite the fact that the Ninth Circuit tried to limit its holding in *Andrade* to its "unusual circumstances" (*Andrade*, 270 F.3d at 767), the opinion is being used as a sword to attack sentences that have little, if anything, to do with *Andrade's* unique facts. State-wide, Petitioner's office is receiving a number of orders from magistrate judges, district courts, and the Ninth Circuit, for briefing on the *Andrade/Brown/Bray* line of cases, including orders for an interjurisdictional analysis when the third-strike is a crime other than petty theft with a prior. In one particularly curious case, petitioner's office has been ordered to provide an interjurisdictional and intrajurisdictional analysis in light of *Andrade/Brown/Bray* in a case where the prior strikes are attempted kidnaping and robbery, and the third-strike is second degree murder (*Andre Eric Watson v. E. Roe, Warden*, Case No. CV 00-4205-MMM (MAN)).

The *Andrade/Brown/Bray* line of cases has also resulted in an intolerable tension between the state and federal courts. *Andrade* and its progeny have suggested that all third-strike sentences in California are vulnerable to reversal on an Eighth Amendment challenge, regardless of the nature of the prior strikes or of the third-strike conviction. At the same time, however, contrary to the core holdings in *Andrade/Brown/Bray*, a number of state courts of appeal have held the imposition of a twenty-five-years-to-life sentence on a defendant whose third strike conviction is for a low-grade felony and whose criminal record does not include a history of violence, does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *People v. Goodwin*, 59 Cal. App. 4th 1084, 1093-94, 69 Cal. Rptr. 2d 576 (1997); *People v. Cooper*, 43 Cal. App. 4th 815, 820-26, 51 Cal. Rptr. 2d 106 (1996); *People v. Barrera*, 70 Cal. App. 4th 541, 556, 82 Cal. Rptr. 2d 755 (1999). California's sentencing courts are not bound to the Ninth Circuit's decisions, but are bound to the decisions of the

state's courts of appeal. Thus, in many cases, California's sentencing courts are placed in the unreasonable position of having to consider whether they should impose an indeterminate life sentence or exercise their discretion to dismiss strikes in order to achieve a less harsh sentence, knowing full well that if they choose not to dismiss strikes, that exercise of discretion will pass state muster but is virtually certain to be reversed on federal habeas corpus review. The reasonable inference is that as a result, California's sentencing courts may be influenced, subtly or subconsciously, to exercise the discretion the People of the State of California endowed them with, in a manner that will simply avoid the inevitable.

In sum, the *Andrade* opinion's failure to properly apply this Court's jurisprudence concerning Eighth Amendment proportionality challenges, its failure to be guided by the criteria presented in this Court's most recent relevant opinions, and its failure to accord the state court determination due deference, has spawned a line of cases that continue to conflict with the relevant decisions of this Court on an important federal question. Moreover, the opinion undermines the balance Congress struck between the state and its courts on one hand, and the federal courts on the other and, in the process, threatens to unduly affect the discretion the People of California, by their duly elected Legislature, have vested in the sentencing courts. In addition, if allowed to stand, the opinion is likely to result in even greater mischief, as it has opened the floodgates of litigation to unprincipled federal review of thousands of sentences in California. Accordingly, petitioner respectfully submits the Ninth Circuit's opinion in *Brown/Bray* further supports petitioner's petition for writ of certiorari in the instant matter, and requests the writ be issued.

CONCLUSION

For the foregoing reasons, Petitioners-Appelles request that the writ be issued.

Dated: March 29, 2002

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SUPPLEMENTAL APPENDIX

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1127

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioner-Appellee,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

Brown v. Mayle, ___ F.3d ___, 2002 U.S. App. LEXIS 1834; 2002 Cal. Daily Op. Service 1222; 2002 Daily Journal DAR 1638 (9th Cir. 2002) 2

RICHARD NAPOLEON BROWN, Petitioner-Appellant, v. D. A. MAYLE; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.
EARNEST BRAY, JR., Petitioner-Appellant, v. EDDIE YLST, interim Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; DANIEL E. LUNDGREN, Respondents-Appellees.

No. 99-17261, No. 99-56197

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2002 U.S. App. LEXIS 1834; 2002 Cal. Daily Op. Service 1222; 2002 Daily Journal DAR 1638

December 12, 2001, Argued and Submitted, Pasadena, California; February 7, 2002, Filed

Appeal from the United States District Court for the Central District of California. D.C. No. CV-98-04672-R-BQR. Manuel L. Real, Chief Judge, Presiding.

DISPOSITION: Reversed in part and remanded.

COUNSEL: Erwin Chemerinsky, Los Angeles, California, for the appellants.
Brian R. Means and Stephanie A. Miyoshi, State of California Department of Justice, for the appellees.

JUDGES: Before: Stephen Reinhardt, A. Wallace Tashima and Marsha S. Berzon, Circuit Judges.

BERZON, Circuit Judge:

Earnest Bray, Jr. and Richard Napoleon Brown were each convicted of petty theft, Bray for attempting to steal three videotapes and Brown for attempting to steal a steering wheel alarm. Because of prior convictions, each was sentenced to life without possibility of parole for 25 years. Each now appeals the denial of a habeas petition contending that his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment.

This court recently held, in *Andrade v. Attorney General of the State of California*, 270 F.3d 743 (9th Cir. 2001), that a 50-year-to-life sentence for two petty theft convictions violated the Eighth Amendment's prohibition against cruel and unusual punishment, and that the California Court of Appeal unreasonably applied clearly established United States Supreme Court law when it held otherwise. *Id.* at 747. Because these cases are indistinguishable from *Andrade* in any material respect, we similarly hold that the California Court of Appeal decisions upholding 25-year-to-life sentences for petty theft were contrary to and unreasonable applications of clearly established Supreme Court law. Like *Andrade*, "our decision does not invalidate California's Three Strikes law generally." *Id.*

I. BACKGROUND

A. Provisions of the California Three Strikes Law

As *Andrade* summarizes in detail the pertinent background and features of California's so-called three strikes law ("Three Strikes"), Cal. Penal Code §§ 667(b)-(i) and 1170.12, we do so only briefly here. *See* 270 F.3d at 747-48. Unless otherwise stated, all statutory citations are to the California Penal Code. A defendant with two or more prior "strikes" -- that is, certain felony convictions -- who is convicted of a felony must be sentenced under the Three Strikes statute to no less than 25

years to life, § 667(e)(2)(A), and cannot receive "good time credits" to reduce his sentence below the mandatory minimum term of 25 years. *In re Cervera*, 24 Cal. 4th 1073, 16 P.3d 176, 181 (Cal. 2001). Only "serious" felonies, see § 1192,7(c), or "violent" felonies, see § 667.5(c), count as prior strikes. § 667(d)(1). The current offense that triggers the Three Strikes penalties, however, may be any felony under California law. § 667(e)(2)(A). It is this latter feature that led to life sentences for minor thefts in *Andrade* and in these cases.

Petty theft -- theft of goods or money worth less than $ 400, §§ 487, 488 -- is a misdemeanor, carrying a maximum sentence of 6 months in jail, § 490. Petty theft "with a prior" -- that is, when committed after a conviction and time served for petty theft, grand theft, auto theft, burglary, carjacking, robbery, or receiving or concealing stolen property -- is punishable either as a misdemeanor with up to one year in county jail or as a felony with up to three years in state prison. §§ 666, 496, 18.

A conviction of petty theft with a prior as a felony can count as the triggering offense for purposes of Three Strikes, *People v. Terry*, 47 Cal. App. 4th 329, 54 Cal.Rptr.2d 769, 770-71 (Ct. App. 1996), leading to two unusual features of California recidivism law. First, the "core conduct" of petty theft with a prior "is, in the first instance, classified as a misdemeanor rather than a felony." *Andrade*, 270 F.3d at 760. Where petty theft with a prior results in a felony conviction, the petty theft offender's recidivism can be "double counted, "so as initially to transform the misdemeanor of petty theft into a felony and then to count it as the basis for a life sentence. *Id.* at 759-60; *see also Riggs v. California*, 525 U.S. 1114, 142 L. Ed. 2d 789, 119 S. Ct. 890 (1999) (Stevens, J., memorandum opinion respecting the denial of the petition for writ of certiorari).

Second, if petty theft is committed after multiple prior

convictions for non-theft offenses, including serious and violent offenses, then the petty theft must be charged as a misdemeanor and cannot trigger Three Strikes' enhancements. *See* § 666. So, for example, if Bray's or Brown's prior convictions had all been for assault or manslaughter, neither could have been sentenced to 25 years to life for his petty theft conviction; only a six-month misdemeanor sentence would have been possible. *See* § 490, 666.

B. Facts and Procedural History

1. *Bray v. Ylst*

a. *Bray's Principal Offense*

On March 28, 1994, Bray attempted to steal three videotapes from a music and video store in a Long Beach, California shopping mall. He activated the store's alarm system when he tried to leave, and the store's clerks detained him and turned him over to mall security. When the police arrived and arrested Bray, they confiscated a plastic bag containing the videotapes.

b. *Bray's Prior Convictions*

In finding Bray guilty for the theft of the videotapes, the jury also found that he had been convicted of four previous felony offenses.[1] In February 1980, Bray was convicted on

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1. Bray's criminal record also includes other convictions not considered by the jury -- obstructing/resisting a public officer and trespass in 1979, possession of a dangerous weapon in 1985, being under the influence of a controlled substance in 1991, and petty theft with a prior while he was out on bail for the instant offense in 1995.

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three separate counts of robbery, § 211. The first two convictions stemmed from one August 1979 incident in which Bray and a co-defendant stole a purse and a briefcase from the driver of a car. When the victim grabbed Bray, his codefendant, who was brandishing a gun, pointed it at the driver's head and threatened to kill her if she did not release Bray. The victim complied, but as Bray and the co-defendant fled the scene, the co-defendant fired three shots.

The third robbery conviction stemmed from a separate incident in which Bray and several co-defendants approached the victim and demanded his watch. One co-defendant then hit the victim in the face and took the watch. After the victim fell to the ground, a second co-defendant kicked him in the face and took five dollars in cash. The court sentenced Bray to three years in prison for each of the three convictions, the sentences to run concurrently. After 21 months, he was released on a work furlough.

The jury also found that in November 1987, Bray was again convicted of robbery. The court sentenced Bray to three years in prison, but he was paroled approximately 18 months later.

c. *Prior Proceedings*

Based on the presence of a prior theft conviction, Bray's current petty theft offense was charged as a felony, § 666. The jury convicted Bray of the felony and returned "true" findings on the allegations that Bray had four prior serious or violent felony convictions and had served two prior prison terms. Because he was convicted for the current offense as a felony and the jury found two or more prior strikes, Bray was subject to the mandatory 25-year-to-life sentence provided by Three Strikes. At sentencing, the court rejected Bray's argument that

his punishment was cruel and unusual in violation of the Eighth Amendment. Bray appealed his sentence on the same grounds, but the California Court of Appeal rejected this contention in an unpublished opinion, and the California Supreme Court denied Bray's petition for review.

Bray then filed a 28 U.S.C. § 2254 habeas petition in district court. The magistrate judge issued a report concluding that Bray's sentence did not violate the prohibition against cruel and unusual punishment. Adopting the magistrate judge's reasoning, the district court denied Bray's habeas petition. Although the district court denied Bray's application for a Certificate of Appealability (COA), this court granted a COA on the cruel and unusual punishment issue. [2]

2. *Brown v. Mayle*

a. *Brown's Principal Offense*

On August 7, 1995, Brown attempted to shoplift a steering wheel alarm worth $25 from a Walgreens store. He picked up a few items in the store and left them on the counter, telling the clerk that he needed to go get his checkbook. He returned

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2. Bray's original pro se brief to this court challenged his sentence on a second ground -- that the Three Strikes law changed the role of judges and prosecutors and thus was not a proper subject of urgency legislation (legislation that takes immediate effect as opposed to waiting until January 1st at least 90 days after enactment) under the California Constitution. The second issue was not alleged in the district court petition and was not covered by the COA, so we do not have jurisdiction to decide it. In any event, this issue rests solely on state law, so it is not cognizable in a federal habeas proceeding. Williams v. Borg, 139 F.3d 737, 740 (9th Cir. 1998).

several hours later and brought a few more items to the counter. When the clerk asked if he had found his checkbook, he replied that he had. After questioning why the clerk kept watching him, he put the items down and stated that he did not want to buy anything from the store. When Brown tried to leave again, he set off the store's alarm system. The clerk detained Brown and asked him to return what he had taken. He evidently refused. When security guards arrived, they found on Brown the steering wheel alarm with a security tag.[3/]

b. *Brown's Prior Convictions*

Although Brown's criminal history is somewhat longer than Bray's and includes numerous convictions for misdemeanor offenses, Brown has a total of five serious or violent prior felony convictions:[4/] A 1971 conviction for two counts of

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3. The state asserts without citation in its supplemental brief that Brown physically resisted after the store's security guard caught him, so that his principal offense involved violence. The crime of which Brown was convicted (petty theft with a prior) does not, however, require any proof of violence. Even if violence of which a defendant was not convicted were relevant under the Eighth Amendment -- which we do not believe it is -- nothing in the record, including the information, the probation officer's description of the offense, the California Court of Appeal opinion, and the district court opinion, indicates that resistance or violence was involved in the petty theft offense.

4. Brown's other convictions include: (1) a misdemeanor conviction in 1986 for being under the influence of a controlled substance; (2) misdemeanor convictions in 1987 for giving false information to the police, driving with a suspended license, and DUI; (3) a 1989 misdemeanor theft

second degree burglary, § 459; a 1976 conviction for two counts of assault with a deadly weapon, § 245; and a 1984 robbery conviction,[5/] § 211. The record does not reveal the underlying facts of these offenses.

c. *Prior Proceedings*

The jury found Brown guilty of petty theft with a prior, § 666. Brown had waived the right to have a jury determine whether his prior convictions were true, and the court found that he had been convicted of two prior strikes -- the 1976 assault and the 1984 robbery. At sentencing, Brown moved to have the court strike the prior convictions on the grounds that a 25-year-to-life sentence would constitute cruel and unusual punishment. The court rejected the motion and sentenced Brown under Three Strikes to 25 years to life.

Brown appealed his sentence, arguing that the term imposed was disproportionate to his offense and therefore in violation of the federal and state constitutional prohibitions against cruel and unusual punishment. The California Court of

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conviction; (4) a felony vehicle theft conviction in 1990; (5) misdemeanor convictions in 1990 for giving false information to the police, burglary, and distribution of hypodermic needles without a license; (6) misdemeanor convictions in 1991 for theft, battery, and petty theft with a prior; (7) misdemeanor convictions in 1992 for second-degree robbery and possession of drug paraphernalia; and (8) a misdemeanor conviction in 1994 for possession of controlled substances without a license.

5. Brown was originally convicted of felony burglary, § 459, in 1982, but after the conviction was reversed and remanded, pleaded guilty in 1984 to one count of felony robbery.

Appeal issued an unpublished opinion affirming Brown's sentence, and the California Supreme Court denied his petition for review without opinion. Brown filed a habeas petition in the California Court of Appeal and later in the California Supreme Court, but both courts issued bare denials of the petitions.

Brown then petitioned for habeas relief in the federal district court, raising four claims: (1) the Three Strikes law is unevenly applied; (2) he should be resentenced pursuant to the California Supreme Court decision of *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 917 P.2d 628 (Cal. 1996) (allowing judges to "strike" a defendant's prior strikes for purposes of applying Three Strikes, if it would be "in furtherance of justice"), decided after he was sentenced; (3) 25 years to life for petty theft constitutes cruel and unusual punishment; and (4) his prior convictions should be stricken because they occurred before Three Strikes was enacted.

The magistrate judge's report construed the uneven application argument as an equal protection claim and the request to strike the prior convictions because of their timing as an ex post facto claim, and recommended rejecting both contentions on the merits. The report also recommended that the Eighth Amendment claim be rejected on the merits and that the request to be resentenced be denied, because such relief must be pursued in state court. The district court adopted these recommendations in full and denied the habeas petition. After obtaining a COA for all four issues from the district court, Brown raised each of them in his original pro se habeas petition to this court.

3. *Prior Proceedings in This Court*

Bray and Brown initially filed pro se petitions in this court. After *Andrade* was decided, we consolidated the cases,

appointed counsel, and ordered supplemental briefing and argument regarding the impact of *Andrade* on the constitutionality of Bray's and Brown's sentences.

II. DISCUSSION

We review de novo a district court's denial of a 28 U.S.C. § 2254 petition. *Bribiesca v. Galaza*, 215 F.3d 1015, 1018 (9th Cir. 2000). Because Bray and Brown filed their federal habeas petitions after April 24, 1996, the amendments to 28 U.S.C. § 2254 under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply. *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir. 2000).

Under AEDPA, a federal court may grant a writ of habeas corpus to a state prisoner only if the state court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or were "based on an unreasonable determination of the facts in light of the evidence presented" in the state courts. 28 U.S.C. § 2254(d). A state court decision is" contrary to" clearly established federal law if it "failed to apply the correct controlling authority from the Supreme Court." *Shackleford v. Hubbard*, 234 F.3d 1072, 1077 (9th Cir. 2000); *see also Williams v. Taylor*, 529 U.S. 362, 405-07, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000); *Packer v. Hill*, 2002 U.S. App. LEXIS 608, 2002 WL 47063 (9th Cir. Jan. 15, 2002). In order to merit habeas relief under the "contrary to" clause of AEDPA, however, a petitioner must show not only that the state court failed to apply clearly established Supreme Court law but also that it reached an erroneous decision that warrants issuance of the writ under the standard in *Brecht v. Abrahamson*, 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) (requiring that the error have had a substantial or injurious effect on the

verdict). *See Packer*, 2002 U.S. App. LEXIS 608, 2002 WL 47063 at *7.

The requirements for relief are somewhat higher where the state court applied the clearly established federal law but erred in doing so: A state court's decision applying clearly established federal law is "unreasonable" under AEDPA only when we are left "with a 'firm conviction' that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous -- in other words that clear error occurred." *Van Tran*, 212 F.3d at 1153-54. The *Brecht* standard must be met as well in "unreasonable application" cases. *See Packer*, 2002 U.S. App. LEXIS 608, 2002 WL 47063, at *7.

As we develop below, (*see* Part C, *infra*), Bray and Brown are properly characterized as "contrary to "cases because the state court decisions in both cases failed to apply some or all of the required Supreme Court analysis as enunciated in *Rummel v. Estelle*, 445 U.S. 263 (1980), *Solem v.Helm*, 463 U.S. 277, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983), and *Harmelin v. Michigan*, 501 U.S. 957, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991). In *Andrade*, however, we held that the petitioner was entitled to relief because the state court decision involved an "unreasonable application" of *Rummel*, *Solem*, and *Harmelin*. 270 F.3d at 766-67. Because the substantive issues in Bray and Brown are so similar to those we recently resolved in *Andrade*, and because applying *Andrade's* analysis here leads to the conclusion that the state court decisions in *Bray* and *Brown* were clearly erroneous, we will analyze the issues here under the more stringent "unreasonable application" standard. As petitioners meet the higher threshold of "clear error" that is required to show an" unreasonable application" of Supreme Court law, a fortiori they meet the lower requirement of "error" that applies in a "contrary to" law case.

A. The Andrade Opinion

In *Andrade*, this court held that the California Court of Appeal unreasonably applied clearly established Supreme Court law when it held that a sentence of life without possibility of parole for 50 years for two petty theft convictions did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. 270 F.3d at 747.

Andrade was convicted of two separate counts of petty theft for shoplifting a total of nine videotapes valued at $ 153.54 from two different K-mart stores, on occasions two weeks apart. Because he had a prior theft conviction, Andrade was charged with a felony for each of the two petty theft counts. The offenses were tried together (although they need not have been). The resulting petty theft convictions were counted as Andrade's third and fourth strikes under Three Strikes, as Andrade had at least two prior serious felony convictions – specifically, three prior residential burglary convictions. Three Strikes mandated a sentence of 25 years to life, with no eligibility for parole for at least 25 years, for each petty theft conviction. The judge ordered, pursuant to a Three Strikes provision, § 667(e)(2)(B), that the sentences run consecutively, so Andrade would not be eligible for parole for at least 50 years. 270 F.3d at 746.

After reviewing the relevant Supreme Court law on the Eighth Amendment, *Andrade* concluded that" three objective criteria . . . guide proportionality analysis under the Eighth Amendment: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. " Id. at 756 (quoting *Solem*, 463 U.S. at 292). Nevertheless, this court recognized that under "the rule of *Harmelin* "articulated in Justice Kennedy's controlling opinion in that case, the " Eighth

Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 754 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring)). A court, therefore, need not consider the second and third prongs of *Solem's* test if the first factor -- a comparison of the punishment to the offense -- does not raise an inference of gross disproportionality. *Id.* at 758.

Comparing the sentence in the case before it to those in the most closely analogous Supreme Court Eighth Amendment cases, *Andrade* found that the penalties in that case -- two consecutive life sentences, each without possibility of parole for 25 years -- were much harsher penalties than the sentence in *Rummel*, because *Rummel* would have been eligible for parole in 12 years or less. Id. at 264.[6] The court analogized the penalty instead to the sentence of life without possibility of parole in *Solem*.[7] Because *Andrade* would not be eligible for parole until

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6. In *Rummel*, the Court upheld a sentence of life imprisonment with possibility of parole for a three-time non-violent felony recidivist. 445 U.S. at 264. Rummel was convicted of obtaining money by false pretenses, a felony ordinarily punishable by two to ten years in prison. Rummel had two prior felony convictions. *Id.*

7. In *Solem*, the Court reversed a sentence of life imprisonment without possibility of parole for a seven-time non-violent felony recidivist who was convicted of writing a no-account check. 463 U.S. 277. Helm had six prior felonies, including false pretenses, grand larceny, driving while intoxicated, and three burglary convictions. *Id.* at 279-80. Uttering a no-account check was a felony ordinarily punishable by up to five years in prison, but under the recidivist statute Helm was sentenced to life without possibility of parole. *Id.* at

age 87, ten years beyond the life expectancy of a 37-year-old male, the court referred to his sentence as "the functional equivalent of . . . life in prison without possibility of parole." *Id.* at 759.

Recognizing that harsher punishments for recidivists are justified, *Andrade* stressed that "the enhanced punishment imposed for the [present] offense is not to be viewed as . . . [an] additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Id.* (quoting *Witte v. United States*, 515 U.S. 389, 400, 132 L. Ed. 2d 351, 115 S. Ct. 2199 (1995)). Focusing on the "latest crime," *Andrade* concluded that shoplifting nine videotapes was comparable to the offense in *Solem* of uttering a no-account check. *Id. Andrade* also noted that the core conduct of petty theft is not conduct traditionally punishable as a felony but as a misdemeanor, punishable by a fine or a jail sentence of six months or less. *Id.* Since "the core conduct for which Andrade was sentenced is, in the first instance, classified as a misdemeanor rather than a felony," 270 F.3d at 760, using petty theft with a prior theft conviction, ordinarily punishable by up to three years in prison, §§ 666, 18, to serve as the "third strike" creates a" unique quirk,"allowing a defendant's recidivism to be "double counted." *Andrade*, 270 F.3d at 759-60. Further, noted *Andrade*, deference to legislative judgments concerning the appropriate "extreme sentences" is less pronounced when the offense is not classified as a felony. *Id.* at 760; *see also Riggs*, 525 U.S. at 1114 (Stevens, J., memorandum opinion respecting the denial of the petition for writ of certiorari).

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281. The Court found Helm's sentence "far more severe than the life sentence we considered in *Rummel*" because Rummel could be paroled after 12 years, whereas Helm had no possibility of parole. *Id.* at 297.

Andrade concluded that the threshold comparison of the harshness of the penalty to the gravity of the crimes led to an inference of gross disproportionality and that Andrade's criminal record did not "dissipate" that determination. 270 F.3d at 761.

In light of its conclusion that the first *Solem* factor raised an inference of gross disproportionality, *Andrade* proceeded to the second factor -- whether the sentence is excessive in comparison to sentences imposed on other criminals in California. 270 F.3d at 761. *Andrade* again noted that petty theft is ordinarily punished by no more than six months in jail, or, if committed after a prior theft conviction, by a term of up to three years in prison (if charged as a felony) or up to one year in jail (if charged as a misdemeanor). *See id.*; *see also* § 666, 18. And violent offenses such as second degree murder, voluntary manslaughter, and sexual assault carry much less serious penalties than Andrade's Three Strikes sentence. 270 F.3d at 761-62.

The State argued in *Andrade*, as it does here, that the indeterminate life sentence was in line with sentences imposed on other recidivist petty theft offenders under Three Strikes. The court in *Andrade* was not persuaded by that argument, stating: "Although we agree that comparisons to other sentences for other recidivists are relevant, the problem with the State's argument is that it attempts to justify the constitutionally-suspect application of a statute by pointing to other applications of the same statute. We find this approach less than convincing." *Id.* at 762. *Andrade* concluded that the intrajurisdictional comparison supported the inference that Andrade's sentence was grossly disproportionate. *Id.*

Applying the final prong of the *Solem* analysis, *Andrade* found only four other jurisdictions where the "triggering offense

(petty theft with a prior) could qualify for recidivist sentencing: Rhode Island, West Virginia, Texas, and Louisiana." *Id.* at 763. Looking closely at the law in those jurisdictions, *Andrade* concluded that the Rhode Island recidivism statute applies only to thefts of more than $ 100; West Virginia does not count non-violent priors; Texas has a liberal parole policy, so the minimum sentence is much less than in California; and, while Louisiana might have, at the time, imposed a comparable sentence to the one Andrade received, there was "a distinct possibility, unlike in California, that a Louisiana court might have invalidated such a sentence as excessive under the state constitution." *Id.* at 763-65. The possibility of a comparable sentence in only one other jurisdiction, held *Andrade*, strengthened rather than undermined the conclusion that the sentence was grossly disproportionate to the crimes. *Id.* at 765.

Having decided that the California Court of Appeal's holding was erroneous, *Andrade* further concluded that the result was contrary to or an unreasonable application of clearly established United States Supreme Court law, entitling Andrade to relief under 28 U.S.C. § 2254. *Id.* at 766-67. *Andrade* held that "the law governing the application of the Eighth Amendment to non-violent offenders sentenced to life imprisonment was clearly established" and that a proper proportionality analysis requires a comparison to *Rummel*, *Solem*, and *Harmelin*. *Id.* at 766. The California Court of Appeal had questioned the validity of *Solem* after *Harmelin* and focused its analysis exclusively on *Rummel*, concluding that Andrade's sentence was not disproportionate when his crimes and criminal history were compared with that of *Rummel*. *Id.* at 766. *Andrade* held that "the California Court of Appeal's disregard for *Solem* results in an unreasonable application of clearly established Supreme Court law" and that "its conclusion that Andrade's sentence does not violate the Eighth Amendment is irreconcilable with the Supreme Court's decision in *Solem* and

thus constitutes clear error." *Id.* at 766-67.

B. Application of Andrade to Bray's and Brown's Sentences

Bray's and Brown's cases are very similar to Andrade's in most respects. As in *Andrade*, Bray and Brown were convicted of shoplifting merchandise worth a small amount of money, an offense ordinarily punishable by a maximum of six months in jail, and sentenced to indeterminate life sentences. While the circumstances of these cases vary in several respects from those in *Andrade*, we conclude that none of these distinctions justifies a different result.

1. *Gross Disproportionality*

The State argues that Bray's and Brown's sentences are only half as long as Andrade's, so that *Andrade's* gross disproportionality analysis has no application here. Andrade, however, was sentenced to 50 years to life for two petty theft convictions; his sentence was nothing more than a 25-year-to-life sentence for a petty theft conviction followed by a consecutive, identical sentence for a second petty theft conviction, imposed for a distinct, albeit similar, offense that occurred at a different time and place. Although Andrade was tried and sentenced at one time for his two offenses, the joint conviction was fortuitous; there could as easily have been separately imposed consecutive sentences. Moreover, Bray's and Brown's sentences are not half as long as Andrade's. Although their minimum term is half as long as Andrade's minimum term, Bray and Brown were sentenced to indeterminate life sentences and could serve as long for their single petty theft convictions as Andrade will for two.

It bears noting, in this connection, that the standard we are applying is one of proportionality -- the relationship of the

conviction to the crime. If Andrade's 50-year-to-life sentence for two petty theft convictions was grossly disproportionate, it follows that a 25-year-to-life sentence is grossly disproportionate to one petty theft conviction. A combined sentence for two entirely separate offenses cannot be grossly disproportionate if each individual sentence is not grossly disproportionate.[8]

Andrade was sentenced to life imprisonment, with no possibility of parole for 50 years, at which time he would be 87 years old. Bray and Brown will both be eligible for parole in 25 years, when they will be about 59 and 67 years old, respectively. As to these possible differences in age on release, that factor cannot be determinative. An Eighth Amendment analysis necessarily considers the punishment for the offense, *Solem*, 463 U.S. at 292, taking into account only those personal circumstances that may mitigate one's culpability in committing the crime. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 340, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989). So, while *Andrade* mentioned the petitioner's age at possible release, the court could not have meant that the same sentence would have been acceptable for a 19-year old, or that a person with a limited life expectancy is constitutionally entitled to a short sentence for the same crime as a co-defendant not so impaired. Rather, the fact that Andrade could well die before serving out his sentence simply underscored the length of the mandatory sentence. Here, Bray and Brown entered prison as relatively young men and

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8. Justice Stevens and the three other justices who joined his reasoning in *Riggs* were very concerned about a 25-year-to-life sentence for petty theft, which they analogized to the offense in *Solem* of writing a bad check. 525 U.S. at 1114 (Stevens, J., memorandum respecting the denial of the petition for certiorari) (noting that the petition "raised a serious question concerning the application of California's' three strikes' law").

will emerge, if at all, as senior citizens (Brown) or close thereto (Bray), again demonstrating the length of their punishment. *See Sistrunk v. Armenakis*, 271 F.3d 1174, 1183 (9th Cir. 2001) (Kozinski, J., dissenting) (stating that the defendant's life was at stake, because "to an adult man, a thirty-year sentence pretty much is life").

2. *Intrajurisdictional Comparison*

Nor does the length of Bray's and Brown's sentences change the result of the intrajurisdictional comparison performed in *Andrade*. Bray and Brown could each have been sentenced for up to three years in prison under Section 666 for their single petty theft convictions, in light of their prior records, while Andrade could have been sentenced for up to six years for his two petty thefts. A 25-year minimum sentence bears the same relationship to the usual three-year sentence for Bray's and Brown's crimes as a 50-year minimum does to the usual six-year sentence. *See Andrade*, 270 F.3d at 761.

Further, the violent crimes to which *Andrade* compared the 50-year sentence -- second degree murder, voluntary manslaughter, rape, and sexual assault on a minor -- all carry sentences considerably less than 25 years to life. *See id.* at 761-62. Moreover, defendants who commit the same crimes as Brown and Bray and whose records include serious or violent crimes but no theft convictions can be punished under California law by no more than six months in jail. *See* § 666. So Bray and Brown were sentenced to higher terms than criminals who commit serious violent crimes, and than criminals who commit the same crime and have a comparable past record of violent or serious crime.

Additionally, *Andrade* must necessarily have based its intrastate comparison on one 25-year-to-life sentence rather than

two; otherwise, the comparison should have been to two convictions for violent crimes, which it was not. *See* 270 F.3d at 761-62. Because Bray and Brown received indeterminate life sentences for one petty theft conviction although they could not have been so sentenced for many violent crimes, their sentence, if anything, is more disproportionate on an intrajurisdictional basis than was *Andrade's*.

Bray's and Brown's sentences, we recognize, do not have the distinguishing feature of Andrade's sentence, which was twice as long as that of most petty theft offenders sentenced under Three Strikes. But again, Andrade was sentenced for two, entirely distinct offenses. Anyone sentenced under Three Strikes for two petty thefts with priors would have received the same sentence. Any lack of similar sentences, then, must have been because no one else was sentenced for two such petty thefts under Three Strikes, not because others who were sentenced for similar crimes received lesser sentences.

The State nonetheless maintains that because a few hundred other defendants have been sentenced to 25 years to life under Three Strikes with the triggering offense of petty theft, the sentence is not disproportionate. As *Andrade* held, this approach is "less than convincing," because" it attempts to justify the constitutionally-suspect application of a statute by pointing to other applications of the same statute. " *Id.* at 762. In other words, that a sentence is imposed frequently, while relevant to proportionality analysis, cannot be the determining factor, as the protections of the Eighth Amendment are not reserved only for aberrant situations. If, for example, the state decided to chop off the hands of everyone convicted of speeding, the likely conclusion that such a sentence is cruel and unusual would not change because the state inflicted it on many people. Thus, while a comparison between a particular defendant's sentence and that imposed on other recidivists may

sometimes be informative, as it was in *Andrade*, such comparison is neither necessary nor, if one discovers only that others have been similarly sentenced under the same statute, entitled to much weight.

3. *Interjurisdictional Comparison*

Andrade noted that in only four states can petty theft with a prior qualify for recidivist sentencing. Looking at those four states, we conclude that at the time his offense was committed and at the time he was sentenced, Bray could not have received a life sentence without possibility of parole in any of them. Brown could have received a life sentence without possibility of parole in Louisiana, because he was arrested and sentenced while a version of the Louisiana law so permitting was in effect. But, Louisiana has since amended its habitual offender law so that such a sentence is not currently available in Louisiana in either Bray's or Brown's case. Thus, if one can divine a contemporary judgment on the matter among the states, it is that the sentences Brown and Bray received are disproportionate to their petty theft offenses.

a. *Rhode Island*

Like *Andrade*, Bray and Brown were convicted of stealing merchandise worth less than $100, an offense that cannot count as a felony in Rhode Island, even with prior theft convictions. R.I. Gen. Laws § 11-41-20(d); *see also*270 F.3d at 763. Thus, the additional 25-year penalty for three-time felons, R.I. Gen. Laws § 12-19-21, would not have applied to either Bray or Brown, and the maximum term that Rhode Island could have imposed on them would be one year, *id.* § 11-41-20(d).

b. *Texas*

If two prior theft convictions were counted for each of them, Bray and Brown could have received up to 20 years in prison for a petty theft conviction under Texas' habitual offender law, Tex. Penal Code Ann. §§ 31.03(e)(4)(D), 12.42(a)(2) & (3), 12.33, but they would have been eligible for parole in five years, or even less with good time credits, Tex. Gov't Code Ann. § 508.145(f) – a distinctly less onerous sentence than the mandatory 25-year sentence they will have to serve in California.

c. *West Virginia*

West Virginia allows for a life sentence upon a third felony conviction. W.Va. Code § 61-11-18(c). West Virginia, however, provides by statute that offenders sentenced to life under the recidivist statute are eligible for parole in 15 years. *Id.* § 62-12-13. Even if West Virginia would have allowed a life sentence for Bray or Brown, they would have been eligible for parole ten years earlier there than in California. Further, while Andrade concluded that West Virginia does not allow life sentences for non-violent recidivists, 270 F.3d at 765, West Virginia also precludes life sentences for some recidivists with violent prior felonies.[9]

Under West Virginia constitutional proportionality law, the principal offense, not preceding felony convictions, is the central, albeit not exclusive, focus, "since it provides the ultimate nexus to the sentence." *Wanstreet v. Bordenkircher*,

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9. The applicable statutes in West Virginia do not distinguish between violent and non-violent prior felony convictions. See W. Va. Code § 61-11-18(c). The West Virginia courts, however, conduct detailed proportionality analysis and, as the cases alluded to in the text indicate, not infrequently hold recidivist sentences invalid after conducting that analysis.

166 W. Va. 523, 276 S.E. 2d 205, 212 (W. Va. 1981) (holding that a life sentence for check forgery violated the state constitution, even though one of the prior felonies was for arson); *see also State v. Miller*, 184 W. Va. 462, 400 S.E. 2d 897, 898 (W. Va. 1990) (finding life sentence disproportionate for an assault conviction that involved a firearm, with prior felonies of breaking and entering, forgery, and false pretenses); *State v. Lewis*, 191 W. Va. 635, 447 S.E. 2d 570, 575 (W. Va. 1994) (holding that a provision of the criminal code requiring a sentence of one year in prison for a third shoplifting offense violated the state constitutional prohibition against cruel and unusual punishment). Using this approach, the West Virginia Supreme Court has, on at least one occasion, held a life sentence in violation of state proportionality standards when the offender had a violent prior offense, stressing the remoteness in time of the violent offense. *State v. Deal*, 178 W. Va. 142, 358 S.E. 2d 226, 231 (W. Va. 1987) (finding a life sentence disproportionate for possession of a controlled substance where the record revealed a violent prior felony conviction 16 years earlier).

Three of Bray's violent felony convictions occurred 15 years earlier, while the other was eight years before. It is therefore possible that, focusing on the non-violent nature of his petty theft offense and acknowledging that his prior violent felony convictions were dated, Bray's sentence would have been considered excessive in West Virginia. Brown's prior violent felony convictions occurred 13, 1 9, and 24 years prior to his petty theft offense. His sentence might well have been considered excessive in West Virginia, based on the age of the violent offenses.

d. *Louisiana*

Finally, under Louisiana's habitual offender statute, at the time the last offenses in these cases were committed, Bray could

not have received a comparable sentence, although Brown could have received a higher one.

i. *Bray*

Before August 15, 1995,[10] the Louisiana habitual offender statute required that both the third or fourth strike triggering life imprisonment and two of the prior felonies be "a crime of violence . . ., a sex offense, or . . . a violation of the Uniformed Controlled Substances Law punishable by imprisonment for ten years or more or any other crime[]punishable by imprisonment for twelve years or more." *See* 1995 La. Sess. Law. Serv. 1245 § 1 (West) (amending La. Rev. Stat. Ann. § 15: 529.1(A)(1)(b)(ii) & (c)(ii)). Because his current offense, albeit treatable as a felony if two prior thefts were considered, *see* La. Rev. Stat. Ann. § 14: 67(B)(3), is not within any of these special categories of felonies, Bray could not have received such a sentence had he committed his offense in Louisiana at the time he committed his petty theft in California.

Rather, the applicable Louisiana law when Bray committed his offense and received his sentence would have allowed him to be sentenced to a maximum of four years for his current offense: That offense could only have been charged as a third felony in Louisiana, because Louisiana considers only offenses tried separately. Bray was convicted of three of his four robberies in one trial, so he had -- and has -- at most three strikes under Louisiana law. *See Andrade*, 270 F.3d at 764 n. 22, 765 (citing *State v. Butler*, 601 So. 2d 649, 650 (La. 1992); *State v. Corry*, 610 So. 2d 142, 147 (La. Ct. App. 1992)). The petty theft offense, with two prior theft offenses, could be treated as a second or third subsequent felony, in which case the

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10. Bray committed his petty theft on March 28, 1994, and the court sentenced him on April 5, 1995.

maximum sentence for Bray would have been twice the two-year maximum for a first-time offender. La. Rev. Stat. Ann. §§ 14: 67(B)(3), 15: 529.1(A)(1)(b)(i); *see also Andrade*, 270 F.3d at 764 n. 22.

Louisiana has recently amended its habitual offender law so that it currently reads as it did before August of 1995. 2001 La. Sess. Law Serv. 403 (West). For a period of about six years, however, including the time at which his court of appeal decision was issued, Louisiana could have imposed a sentence of life without possibility of parole on Bray. *See* La. Rev. Stat. Ann. §§ 14: 67(B)(3), 15: 529.1(A)(1)(b)(ii) & (c)(i)-(ii) (West 2000), amended by 2001 La. Sess. Law Serv. 403 (West); *see also Andrade*, 270 F.3d at 265 & n.22.[11] As the statute so providing was not in effect when Bray committed his last offense and is not in effect now, however, it is of no relevance to the interjurisdictional comparison.

ii. *Brown*

Brown committed his offense and received his sentence while the harsher, interim version of Louisiana's habitual

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11. For a third or fourth felony offender whose principal offense was nonviolent, the Louisiana habitual offender statute, between 1995 and 2001, distinguished between violent and non-violent prior offenses, providing harsher penalties for offenders with violent priors. La. Rev. Stat. Ann. § 15: 529.1(A)(1)(b)(i)-(ii) & (c)(i)-(ii) (West 2000), amended by 2001 La. Sess. Law Serv. 403. Because at least one of his prior offenses was violent, under the Louisiana statutes Bray could have been sentenced to life without possibility of parole. *Id.* § 15: 529.1(A)(1)(b)(ii), amended by 2001 La. Sess. Law Serv. 403; see also id. § 14: 2(13)(w), (y), & (z) (defining armed robbery, simple robbery, and purse snatching as crimes of violence).

offender law was in effect.[12] He therefore could have received a sentence of life without parole had he committed his petty theft offense in Louisiana on the same date that he committed it in California. Brown's two prior strikes -- assault with a deadly weapon and robbery -- would have been considered crimes of violence in Louisiana, so Brown would have been subject to a sentence of life without possibility of parole under the Louisiana statutes in effect during this interim period. *See* La. Rev. Stat. Ann. § 15: 529.1(A)(1)(b)(ii) & (c)(ii) (West 2000), amended by 2001 La.Sess. Law Serv. 403. It appears, however, that, even while this version of the statute was in effect, a life sentence without possibility of parole for petty theft might well have been vulnerable to successful challenge under the Louisiana Constitution, despite Brown's violent priors, given other recent Louisiana proportionality decisions. *See Andrade*, 270 F.3d at 765 (citing *State v. Hayes*, 739 So. 2d 301, 303-04 (La. 1999) (holding that a life sentence was impermissibly excessive for a defendant convicted of theft of over $ 1000 who had a prior robbery conviction, considered violent in Louisiana); *State v. Burns*, 723 So. 2d 1013 (La. Ct. App. 1998)); *see also State v. Neal*, 762 So. 2d 281, 286 (La. Ct. App. 2000) (finding a mandatory life sentence without possibility of parole under the habitual offender statute to be unconstitutionally excessive where the defendant's current offense was theft of $ 160 worth of goods and his priors included two violent offenses -- attempted manslaughter and aggravated battery).

Under the recent amendments to Louisiana's habitual offender statute, Brown could not be subject to a mandatory life sentence without possibility of parole, but he could receive a

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12. Brown committed the petty theft on August 27, 1995, shortly after the amended Louisiana statute went into effect, and the court sentenced him in 1996.

minimum sentence of 20 years for his last offense -- a fourth or subsequent felony -- had his entire record been proven to the trier of fact. *See* La. Rev. Stat. Ann. § 15: 529.1(A)(1)(c)(i).[13] This sentence would be less onerous than his Three Strikes sentence in California: The sentence would be five years shorter, and it is possible that Brown would be eligible for parole before he served 20 years.[14]

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13. Unlike Bray's, Brown's prior felony convictions occurred on at least three separate occasions.

14. It is not entirely clear whether or not parole would be available under Louisiana Law. Although some provisions of the habitual offender statute require the sentence be "without benefit of parole," the pertinent provision does not mandate parole ineligibility. *Compare* La. Rev. Stat. Ann. § 15: 529.1(A)(1)(c)(i)(ii) with *id.* § 15: 529.1(A)(1)(C)(i). If the applicable provision of the Louisiana habitual offender statute does not place any restrictions on parole eligibility, then it incorporates the parole restrictions imposed on habitual offenders in the statute covering the crime of conviction. *State v. Tate*, 747 So. 2d 519, 520 (La. 1999). Brown would have been convicted under the theft statute, La. Rev. Stat. Ann. § 14: 67(B)(3), which includes no restrictions on eligibility for parole. Louisiana cases indicate that under these circumstances, an offender convicted under the habitual offender statute may not be sentenced to a prison term without benefit of parole. *See State v. Girod*, 703 So. 2d 771, 777 (La. Ct. App. 1997) (finding that La. Rev. Stat. § 15: 529.1(A)(1)(c)(i) "was applicable and it provided for a sentencing range of 20 years to life imprisonment with parole eligibility"); *State v. McCadney*, 761 So. 2d 579, 584 & n. 3 (La. Ct.App. 2000) (noting that a defendant sentenced to forty years as a fourth-felony habitual offender was not sentenced without benefit of parole). Louisiana's general parole provision, however, denies parole

To summarize: Under both the law in effect at the time of his offense and current Louisiana law, Bray would have

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eligibility to a third or subsequent felony offender, *see id.* § 15: 574.4(A)(1). The Louisiana courts have explained that where neither the habitual offender statute provision nor the underlying conviction statute restrict parole, the trial court lacks authority to prohibit parole eligibility pursuant to that statute, even where the defendant is ineligible for parole as a third or fourth felony offender under La. Rev. Stat. § 15: 574.4(A)(1). *See St. Amant v. 19th Jud. Dist. Ct.*, 678 So. 2d 536 (La. 1996) (holding that when the statute of conviction does not restrict parole, the trial court must sentence defendant to a term without a prohibition on parole, because "parole eligibility is to be determined by the Department of Corrections pursuant to La. Rev. Stat. § 15: 574.4"); *State v. Larrivere*, 733 So. 2d 703, 705 (La. Ct. App. 1999) (holding that defendant -- a fourth felony offender, and thus ineligible for parole under La. Rev. Stat. § 15: 574.4(A)(1) -- should have been sentenced without benefit of parole for only the first year of his sentence, as provided by the underlying statute of conviction); *State v. Miller*, 703 So. 2d 698 (La. Ct. App. 1997) (finding that the trial court should not have prohibited parole for a third-felony offender, because although La. Rev. Stat. § 15: 574.4 prohibited his parole, parole eligibility is to be determined by the Department of Public Safety and Corrections, not by the trial court); *State v. Langlois*, 620 So. 2d 1193, 1995 (La. Ct. App. 1993) (finding that the trial court should not have prohibited parole for a fourth-felony offender).

Thus, a Louisiana court could not have imposed the mandatory 20-year sentence without benefit of parole. Precisely how the Department of Corrections, which makes parole eligibility determinations, applies § 15: 574.4 is a matter we cannot determine from the case law.

received a much lower sentence in Louisiana than in California. While Brown could have received a higher sentence in Louisiana originally, he would now receive a lower sentence in Louisiana than in California, and might be eligible for parole. So, there was at most one jurisdiction that conceivably would have imposed a higher sentence on one of these defendants, and that jurisdiction has since concluded -- in an era when legislatures are hardly prone to impose light sentences on repeat criminals -- that such a sentence is too high, and would now impose a lower sentence than in California.

Recent rejection of a higher sentence by the only state that perhaps would have allowed it in narrow circumstances signals a considered national legislative judgment based on actual experience that California's sentence is indeed disproportionate to the crime. *See Estelle v. Gamble*, 429 U.S. 97, 102, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976) ("We have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'") (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958) (plurality opinion)). "The circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate," *Harmelin*, 501 U.S. at 1000, and the interjurisdictional comparison cannot in any event be the determining factor in an Eighth Amendment analysis.[15]

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15. See *Harmelin*, 501 U.S. at 1004 ("Although *Solem* considered these comparative factors after analyzing the gravity of the offense and the harshness of the penalty, it did not announce a rigid three-part test.") (internal citation and quotation marks omitted); see also *Solem v. Helm*, 463 U.S. at 291 (in determining unconstitutional disproportionality, "no one factor will be dispositive in a given case"); *Robinson v. California*, 370 U.S. 660, 672, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962) (holding that a 90-day jail sentence for being a drug addict is cruel and unusual punishment, even though at least a few other jurisdictions had similar statutes).

Nonetheless, the fact that California is comparatively isolated in its judgment concerning the appropriate punishment for petty theft by a recidivist, even for a recidivist with some violent criminal history, "'validates [the] initial judgment that [the] sentence is grossly disproportionate to [the] crime.'" *Andrade*, 270 F.3d at 765 (quoting *Harmelin*, 501 U.S. at 1005).

4. *Significance of Violent Prior Offenses*

The final possible point of distinction between these cases and *Andrade* is that both Bray's and Brown's past criminal record includes crimes classified by California as violent crimes, while Andrade's did not. *See* § 667.5. For several reasons, this distinction cannot serve to justify a different result than in *Andrade*.

First, this asserted difference is somewhat ephemeral. Andrade's prior convictions could be considered objectively violent, while it does not appear that any of Bray's or most of Brown's priors were considered "violent" under California law at the time of conviction.

Andrade classified Andrade's residential burglary prior convictions as non-violent, as they are not in the list of violent offenses, § 667.5, referenced by Three Strikes. Nevertheless, residential burglary carries a strong potential for violence and is treated as a violent crime for other purposes, including under federal law. *See Taylor v. United States*, 495 U.S. 575, 581, 588, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990) (noting that the legislative history of the Armed Career Criminal Act of 1984 indicates that burglary was included because it is one "of the

most violent street crimes," and "because of its inherent potential for harm to persons" and that "Congress apparently thought that all burglaries serious enough to be punishable by imprisonment for more than a year constituted a category of crimes that shared this potential for violence . .. ").[16]

Conversely, California law did not categorize ordinary robbery as "violent" when Bray and Brown were convicted. Although Three Strikes references a section listing violent offenses that currently includes "any robbery, " § 667.5(c)(9), this section was only recently amended to include all robberies, Prop. 21 § 15 (approved March 7, 2000). When Bray and Brown were sentenced, section 667.5 included only robberies perpetrated in a dwelling house or inhabited building or trailer where either (1) "it is charged and proved that the defendant personally used a deadly or dangerous weapon," § 667.5(c)(9) (West 1999), amended by Prop. 21 § 15 (approved March 7, 2000); or (2) the defendant voluntarily acted in concert with two or more other persons, § 667.5(c)(18) (West 1999), amended by Prop. 21 § 15 (approved March 7, 2000); *see also* § 213(a)(1)(A). Crimes of violence, as defined by section 667.5,

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16. In Louisiana, burglary can be a violent crime. See La. Rev. Stat. Ann. § 14: 2(13)(v) (listing aggravated burglary as a violent crime in Louisiana). In West Virginia, burglary may also be considered a violent crime. *State v. Housden*, 184 W. Va. 171, 399 S.E. 2d 882, 886 (W. Va. 1990) (burglary is a crime that "by [its] very nature involves the threat of harm or violence to innocent persons"); *but see State v. Hedrick*, 182 W. Va. 701, 391 S.E. 2d 614, 622 (W. Va. 1990) (classifying night-time burglary as a non-violent offense, because "breaking and entering is not per se a crime of violence "and there was "nothing in the record to indicate that weapons were used in these crimes or that there was a threat of violence to any person").

also included any felony in which the defendant inflicts great bodily injury on any person or in which the defendant uses a firearm. § 667.5(c)(8).

It is unlikely that any of Bray's four robbery convictions would have been classified as violent under section 667.5. The first two convictions took place in a car and the third outside on railroad tracks. Nor did Bray himself use a firearm or inflict great bodily injury on any person. The record does not reveal facts indicating that the fourth robbery conviction would have fallen within section 667.5 at the time of Bray's appeal.

One of Brown's prior strikes -- the assault with a deadly weapon, which involved a firearm -- would have been classified as violent under this statute. The record does not reveal any facts of Brown's robbery conviction, other than that it was originally a conviction for burglary, so we cannot assume that it would have met the requirements of a violent felony robbery.

Second, the presence of violent prior offenses might well be of great significance were the crime of conviction a violent crime, but cannot be where the crime of conviction is nonviolent. Where the crime of conviction is a violent one, a more severe recidivist sentencing scheme for defendants with past convictions for violent crimes would simply reflect a judgment that such individuals cannot curb their violence and should therefore be imprisoned for at least a lengthy time and for as long as life. But where, as here, the present conviction does not demonstrate continued proclivity toward involvement in violent crime, distinguishing between criminals convicted for non-violent offenses on the basis of their past violence would run up against compelling Double Jeopardy Clause considerations.

Recidivist sentencing schemes, imposing higher sentences

on repeat offenders, have long been held constitutional in the face of Double Jeopardy challenges. As an early case put it, summarizing and quoting from still-earlier decisions, legislators may constitutionally conclude that "'one who proves, by a second or third conviction, that the former punishment has been inefficacious in doing the work of reform for which it was designed' 'has evidenced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offence.'" *Moore v. Missouri*, 159 U.S. 673, 677, 40 L. Ed. 301, 16 S. Ct. 179 (1895), *quoting Plumbly v. Commonwealth*, 43 Mass. (2 Met.) 413 (1841), and *People v. Stanley*, 47 Cal. 113 (1873); *see also, e.g., Nichols v. United States*, 511 U.S. 738, 747, 128 L. Ed. 2d 745, 114 S. Ct. 1921 (1994); *Spencer v. Texas*, 385 U.S. 554, 559-60, 17 L. Ed. 2d 606, 87 S. Ct. 648 (1967); *Gryger v. Burke*, 334 U.S. 728, 732, 92 L. Ed. 1683, 68 S. Ct. 1256 (1947) ("The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the crime, which is considered to be an aggravated offense because a repetitive one.")

At the same time, "the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it. " *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173, 21 L. Ed. 872 (1874); *see also Witte*, 515 U.S. at 395-96. It is for this reason that the Supreme Court has repeatedly stressed, in upholding recidivist sentencing schemes, that the priors can be relevant only as they aggravate the defendant's culpability for the crime of conviction. If that connection between the prior convictions and the present one is lost, then the Double Jeopardy concerns reemerge. *See Riggs*, 525 U.S. at 1114 (Stevens, J., memorandum opinion respecting the denial of the petition for writ of certiorari).

In this connection, one can perceive two possible theories

upon which a recidivist statute can maintain the relationship between the current crime and past convictions so as to avoid Double Jeopardy concerns about imposing a new punishment for past offenses: A harsher sentence for a new crime can be warranted either (1) because the defendant's repeated violations of the criminal law reveal his incapability of conforming to society's norms in general, *see Rummel*, 445 U.S. at 276 ("The interest in recidivist statutes is" in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law"); or (2) because the defendant's current offense involves repetition of a particular offense characteristic, indicating that the defendant remains prone to that specific kind of antisocial activity -- as for example, when a defendant commits a second theft offense, demonstrating proclivity toward stealing. If neither of these theories serves to justify the sentencing enhancement for the principal offense, then it is hard to escape the conclusion that the enhancement is simply an additional punishment for the previous offenses, in violation of the Double Jeopardy Clause.

Andrade's holding forecloses application of the first theory -- that a general lawbreaking tendency can justify Three Strikes' mandatory indeterminate life sentence for petty theft. See 270 F.3d at 747. After *Andrade*, for all the reasons already surveyed, an indeterminate life sentence for a defendant convicted of felony petty theft with a prior who has at least two prior serious felony convictions, see § 1192.7, violates the Eighth Amendment's prohibition against cruel and unusual punishment.[17]

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17. Andrade had served only one prison term for his three felony convictions, whereas Bray and Brown each served at least two prison terms. This circumstance, however, does not distinguish their cases from *Andrade*. Although repeated

If we attempt to distinguish *Andrade* solely on the basis that Bray and Brown have prior felonies that may have been violent, as opposed to serious, then we would be punishing Bray and Brown as non-violent lawbreakers who were violent in the past. This practice could not be justified under the second, particular criminal proclivity approach. Rather, the sentence would necessarily be "an additional penalty for their earlier [violent] crimes," for which Bray and Brown have already been punished. See Gryger, 334 U.S. at 732; Solem, 463 U.S. at 297 n. 21; Riggs, 525 U.S. at 1114 (Stevens, J, memorandum opinion respecting the denial of the petition for writ of certiorari). Because such additional penalties for past crimes violate the Double Jeopardy Clause, the prior violence in Bray's and Brown's criminal record cannot be a basis for distinction between these cases and Andrade's.

We note, further, that Three Strikes itself does not distinguish between serious and violent prior offenses. Rather, Three Strikes references other sections of the California Penal Code, which exist for other purposes, to define what felonies count as prior strikes. § 667.5(d)(1) (referring to §§ 667.5(c) and 1192.7(c)). Although certain of these offenses can be found in Section 667.5(c) and are labeled as violent, while other strikes

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separate prison terms may suggest that an individual is not deterred from additional crimes by serving time in prison, *see Rummel*, 445 U.S. at 277, the California Legislature made no such distinction in Three Strikes. *See* § 667; *see also People v. Benson*, 18 Cal. 4th 24, 954 P.2d 557, 558 (Cal. 1998) (holding that although defendant's two prior felony convictions – residential burglary and assault with intent to commit murder -- were sustained in one action and arose out of the same set of facts, they constituted two separate strikes). In analyzing a sentence, we should not defer to distinctions that the State never made in the statute imposing the sentence.

appear only in Section 1192.7(c) and are labeled as serious, the category into which prior convictions fit has absolutely no bearing on the application or length of a Three Strikes sentence. In addition, under the petty theft with a prior statute, violent prior felonies are irrelevant to the enhancement of the petty theft into a felony unless they are also theft crimes. These aspects of the California scheme indicate that California is not enhancing sentences because the prior convictions were for violent crimes. Again, (see n. 18, supra), it makes little sense to defer to a penal judgment that the legislature did not make in determining whether or not a particular sentence is unconstitutionally disproportionate to the crime of conviction.

In sum, these cases are materially indistinguishable from *Andrade*. We therefore conclude that Bray's and Brown's sentences did violate the Eighth Amendment's prohibition against cruel and unusual punishment.

C. Analysis of the California Courts of Appeal Decisions

In order to merit habeas relief, the California Courts of Appeal decisions[18] must be either contrary to or involve an unreasonable application of clearly established Supreme Court law. *Andrade* concluded that the United States Supreme Court law governing the Eighth Amendment's prohibition against cruel and unusual punishment was clearly established at the time of the California Court of Appeal decision in that case, that is on May 13, 1997. *See* 270 F.3d at 766; *see also Riggs*, 525 U.S. at 1114 (Stevens. J., memorandum opinion respecting the

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18. Because the California Supreme Court denied petitioners' review petitions without comment, the last reasoned decision on this issue in each case is the opinion by the state court of appeal. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991).

denial of the petition for writ of certiorari) (stating that petitioner sentenced to 25 years to life for petty theft could seek federal habeas relief, because he was asking the Supreme Court to "apply a settled rule of Eighth Amendment law"). Bray's court of appeal decision was filed on May 21, 1997. Although the court of appeal issued Brown's decision in 1996, *Andrade* did not rely on any Supreme Court cases issued after 1991. Therefore, under *Andrade*, the relevant Supreme Court cases were clearly established law by the time of the California Courts of Appeal decisions in these cases.

If we focus particularly on the fact that Bray and Brown had violent prior convictions, that conclusion does not change. Several Supreme Court cases decided before the California decisions in these cases stated that using sentencing enhancements as an "additional penalty for the earlier crimes" as opposed to a "stiffened penalty for the latest crime" could violate the Double Jeopardy Clause. *Witte*, 515 U.S. at 400; *see also Solem*, 463 U.S. at 297 n. 21; *Gryger*, 334 U.S. at 732; *Moore*, 159 U.S. at 677; *Ex parte Lange*, 85 U.S. (18 Wall.) at 173. Thus, the principles that we apply in analyzing the California Courts of Appeal decisions have been clearly established by the United States Supreme Court.

1. California Court of Appeal Opinion in Bray

Bray explicitly raised the argument that his sentence violated the United States Constitution's prohibition against cruel and unusual punishment. The California Court of Appeal opinion in his case, however, referred exclusively to California law and failed to mention any of the three critical Supreme Court cases. More significantly, the court refused to give any weight to the relatively minor nature of his current offense. After reviewing Bray's criminal history, the court stated that, "quite clearly, Bray's sentence is the result of his recidivist

behavior and it is that behavior that justifies the 25 years to life term."[19]

In *Andrade*, we held that upholding an indeterminate life sentence for a petty theft offense which is normally a misdemeanor constituted an unreasonable application of clearly established Supreme Court law governing the prohibition against cruel and unusual punishment. 270 F.3d at 766. Because, as we have shown, Bray's case is materially indistinguishable from *Andrade*, had the state court conducted an analysis under the controlling precedents, it would have been unreasonable for it not to conclude under the *Solem* test that Bray's sentence was grossly disproportionate to his petty theft offense, in violation of the Eighth Amendment. Consequently, the Bray court's decision that the statute, as applied, was constitutional is clearly erroneous, and Bray would be entitled to relief under the "unreasonable application" clause of AEDPA had the state court applied the relevant Supreme Court precedent. *Van Tran*, 212 F.3d at 1153-54.[20] Having determined

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19. The standard applied to determine if a sentence violates the California Constitution is different from a "grossly disproportionate" standard. Under California law, the standard is whether the penalty" is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 930, 105 Cal. Rptr. 217 (Cal. 1972). Although the state court's analysis under California standards is therefore "arguably irrelevant for our purposes," *Andrade*, 270 F.3d at 767 n.24, it is the only indication we have of the state court's reasoning, so we pay it some attention.

20. Because the error affected the length of the sentence, it clearly had a substantial and injurious effect. *See Brecht*, 507 U.S. at 637.

that there was clear error sufficient to satisfy the" unreasonable application" clause, we hold that a fortiori the state court decision was "erroneous" and merits habeas relief under the "contrary to" clause. *See Packer*, 2002 U.S. App. LEXIS 608, 2002 WL 47063, at *7 & n.12 (holding that, when a state court decision fails to apply controlling Supreme Court precedent, "the fact that the result is erroneous is sufficient, so long as the *Brecht* standard is met"). Therefore, Bray is entitled to habeas relief.

2. California Court of Appeal Opinion in Brown

The California Court of Appeal's opinion in *Brown*, like the opinion in *Bray*, focused primarily on state law and concluded that Brown's sentence was not disproportionate to the petty theft offense within the meaning of the California Constitution. Although the *Brown* court did refer to the Supreme Court's decision in *Harmelin*, the court did not apply the controlling Supreme Court test for determining whether a sentence violates the Eighth Amendment. Rather than considering whether Brown's sentence was grossly disproportionate to the crime of petty theft for which he was convicted, as *Solem* and *Harmelin* require, the *Brown* court compared Brown's sentence to his entire criminal history, noting that, if life without parole for one drug offense in *Harmelin* was not disproportionate, then "a fortiori a term of 25 years to life for a person with [Brown's] record cannot be considered disproportional." *See People v. Brown*, C023139, at 3 (Cal. Ct. App. 1997) (second emphasis added). Because the addition, deletion, or alteration of a factor in a test established by the Supreme Court constitutes a failure to apply controlling Supreme Court law, Brown's habeas petition, like Bray's, is properly resolved under the "contrary to" clause of AEDPA. *See Williams*, 529 U.S. at 405-06; *Packer*, 2002 U.S. App. LEXIS 608, 2002 WL 47063, at *6.

In any event, because we hold that Brown's case, like Bray's, is materially indistinguishable from *Andrade*, the *Brown* court's decision that the statute was constitutional as applied was clearly erroneous and would merit habeas relief under the "unreasonable application" clause of AEDPA, had the *Brown* court applied the relevant Supreme Court precedent. *See Andrade*, 270 F.3d at 266 (holding that the state court's disregard for *Harmelin's* distinguishing of the severity of the defendant's crime in that case from the "relatively minor" nature of the offenses in *Solem* resulted in an unreasonable application of clearly established Supreme Court law). The California Court of Appeal itself characterized Brown's petty theft as a "fairly nonserious offense," so the court's application of *Harmelin* to the facts in *Brown* was objectively unreasonable. See id. As we explained in our analysis of the state court decision in *Bray*, the clear error required to satisfy the "unreasonable application" clause of AEDPA a fortiori satisfies the lesser requirement of "error" under the "contrary to" clause. *See Packer*, 2002 U.S. App. LEXIS 608, 2002 WL 47063, at *7 & n. 12. Therefore, Brown, like Bray, is entitled to habeas relief under 28 U.S.C. § 2254.[21]

III. BROWN'S OTHER CLAIMS

A. Uneven Application of the Three Strikes Law

Brown did not make out a prima facie case that the Three Strikes law is unevenly applied in violation of the Equal Protection Clause. Rather, Brown cited only one other case, with facts distinguishable from those in his case. The district court properly found that Brown failed to meet his burden on this claim. *See McQueary v. Blodgett*, 924 F.2d 829, 834-35

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21. The *Brecht* standard is met in Brown, as in Bray, for the reason explained in footnote 20, *supra*.

(9th Cir. 1991). We therefore affirm the denial of the habeas petition on this issue.

B. Resentencing Pursuant to Romero

Brown argued that he should be resentenced in light of the California Supreme Court's decision in *Romero*, 917 P.2d 628, which held that judges have discretion not to count prior qualifying offenses as strikes. The district court correctly concluded that this state law claim is not cognizable on federal habeas review. *See Williams v. Borg*, 139 F.3d at 740. We affirm the denial of habeas relief with respect to this claim.

C. Ex Post Facto

Brown contends that it is unconstitutional to count as strikes offenses committed prior to Three Strikes' enactment. The application of a sentencing enhancement due to a prior conviction does not violate the Ex Post Facto Clause, *United States v. Sorenson*, 914 F.2d 173, 174 (9th Cir. 1990), as long as the statute was in effect before the triggering offense was committed, *United States v. Ahumada-Avalos*, 875 F.2d 681, 683-84 (9th Cir. 1984). Three Strikes took effect in March of 1994, before Brown committed the principal offense in August of 1995. We therefore affirm the denial of habeas relief for this claim.

IV. CONCLUSION

We conclude that sentences of 25 years to life for Bray's and Brown's petty theft offenses violate the Eighth Amendment's prohibition against cruel and unusual punishment. Our decision does not hold the California Three Strikes Law unconstitutional, only its application to mandate a 25-year-to-life sentence for a petty theft offense such as those in these

cases. Bray and Brown's sentences of life imprisonment with no possibility of parole for 25 years are grossly disproportionate to their respective crimes -- stealing three videotapes and a steering wheel alarm -- even in light of their criminal records. The California Courts of Appeal decisions upholding their sentences were both contrary to and unreasonable applications of clearly established Supreme Court law.

We therefore REVERSE the district courts' orders denying habeas relief on this ground, and we REMAND with instructions to issue writs of habeas corpus if, within 60 days following the issuance of our mandate, California has not resentenced Bray and Brown in light of our opinion. With respect to Brown's other claims, we AFFIRM the district court.

(13)

Supreme Court, U.S.
FILED
AUG 13 2002
OFFICE OF THE CLERK

No. 01-1127

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioner-Appellee,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Chief Assistant Attorney General
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Judgment of the United States District Court, dismissing the petition with prejudice	Pet.App. 54*
Opinion of the United States Court of Appeals for the Ninth Circuit, filed Nov. 2, 2001	Pet.App. 2*

*These items, which appear in the Appendix to the Petition for Writ of Certiorari (Pet. App.), at the pages indicated, are omitted from the Joint Appendix pursuant to Rule 26.1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 21, 1996 – Andrade convicted in the Superior Court of the State of California for the County of San Bernardino.

May 13, 1997 – Opinion of the California Court of Appeal, Fourth Appellate District, Division Two, affirming Andrade's convictions.

July 23, 1997 – Order of the California Supreme Court denying Andrade's petition for review of the Court of Appeal's Opinion.

August 19, 1998 – Andrade's Petition for Writ of Habeas Corpus, filed in the United States District Court, Central District of California – Western Division.

February 18, 1999 – Judgment of the United States District Court, dismissing Andrade's petition with prejudice.

April 29, 1999 – Andrade's request for a certificate of appealability.

August 26, 1999 – Order of the United States Court of Appeals for the Ninth Circuit granting Andrade's request for a certificate of appealability.

April 30, 2000 – Andrade's motion for appointment of counsel.

June 28, 2000 – Order of the United States Court of Appeals for the Ninth Circuit denying Andrade's motion for appointment of counsel.

October 30, 2000 – Order of the United States Court of Appeals for the Ninth Circuit vacating submission of the appeal.

November 1, 2000 – Order of the United States Court of Appeals for the Ninth Circuit appointing pro bono counsel to represent Andrade and ordering supplemental briefing.

November 2, 2001 – Opinion of the United States Court of Appeals for the Ninth Circuit filed.

FELONY COMPLAINT IN CASE FWV09140

SAN BERNARDINO COUNTY
MUNICIPAL COURT DISTRICT
WEST VALLEY DIVISION
COUNTY OF SAN BERNARDINO
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
	)	REFILING OF FWV08781
vs.	)	FELONY COMPLAINT
LEANDRO ANDRADE, Defendant	)	

The undersigned is informed and believes that:

COUNT 1

On or about November 4, 1995, in the above named Judicial District, the crime of PETTY THEFT WITH A PRIOR, in violation of PENAL CODE SECTION 666, a Felony, was committed by LEANDRO ANDRADE, who did willfully and unlawfully steal, take, and carry away the personal property of another, to wit, K-Mart, said defendant having been previously convicted of the crime of petit theft on March 7, 1990 in the Municipal Court of the Fullerton Judicial District of the State of California and having served a term therefor in a penal institution and having been imprisoned therein as a condition of probation for said offense.

It is further alleged as to Count(s) one, pursuant to Penal Code sections ll70.12(a) through (d) and 667(b) through (i) that the defendant, LEANDRO ANDRADE, has suffered the following prior conviction(s) of serious or violent felonies or juvenile adjudications: The crime of (1) Residential Burglary in violation of section 459 of the Penal Code on and about the 26th day of April, 1983 in the Superior Court of the state of California, for the county of San Joaquin, Case Number 33894 ; Residential Burglary in violation of section 459 of the Penal Code on and about the 26th day of April, 1983 in the Superior Court of the state of california, for the county of San Joaquin, Case Number 33894 ; (3) Residential Burglary in violation of section 459 of the Penal Code on and about the 26th day of April, 1983 in the Superior Court of the state of California, for the county of San Joaquin, Case Number 33894.

* * * * *

Pursuant to Penal Code Section 1054.5(b), the People are hereby informally requesting that defense counsel provide discovery to the People as required by Penal Code Section 1054.3.

Further, attached hereto and incorporated herein are official reports and documents of a law enforcement agency which the undersigned believes establish probable cause for the arrest of defendant(s) LEANDRO ANDRADE, for the above-listed crimes. Wherefore, a warrant of arrest is requested for LEANDRO ANDRADE.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS COMPLAINT CONSISTS OF 1 COUNT(S).

Executed at Rancho Cucamonga, California, on January 9, 1996

/s/C. Cook
C. COOK
DECLARANT AND COMPLAINANT

AGENCY: ONPD PRELIM TIME EST.:

DEFENDANT	CII NO.	DOB
ANDRADE, LEANDRO		6/06/58

BOOKING NO.	BAIL RECOM'D	CUSTODY RTN DATE

NCIC

STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

FWV09140

FELONY COMPLAINT - ORDER HOLDING
TO ANSWER - P.C. SECTION 872

It appearing to me from the evidence presented that the following offense(s) has/have been committed and that there is sufficient cause to believe that the following defendant(s) guilty thereof, to wit:

(Strike out or add as applicable)

LEANDRO ANDRADE

COUNT NO.	CHARGE	SPECIAL ALLEGATION
1	PC666	PC1170.12(a)-(d)

I order that defendant(s) be held to answer therefor and be admitted to bail in the sum of:

LEANDRO ANDRADE _____ Dollars

and be committed to the custody of the Sheriff of San Bernardino County until such bail is given. Date of arraignment in Superior Court will be:

LEANDRO ANDRADE _____ in Dept: __
at: _____A.M.

Date: _____

_____
Committing Magistrate

STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

It appearing that the defendant, LEANDRO ANDRADE personally and through his attorney _____ _____, has this date pursuant to Section 859a of the Penal Code, State of California, entered a plea of GUILTY to the charge of _____ _____ _____, a Felony, I order that he be certified to the Superior Court of this County for such further proceedings as may be required by law. It is further ordered that the defendant be admitted to bail in the sum of $_____, and to be committed to the Sheriff of the said County of San Bernardino until he gives such bail. And it is further ordered that the defendant LEANDRO ANDRADE appear in Department No. _____, San Bernardino County Superior Court on the _____ day of _____, 19_____, at _____M.

Dated this _____day of _____ 19_____.

_____
Committing Magistrate

INFORMATION FILED IN CASE FWV08781

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
vs.	)	INFORMATION
LEANDRO ANDRADE, Defendant	)	Arraignment Date: 12/20/95 Department 5

INFORMATION SUMMARY

Ct. No.	Charge	Charge Range	Defendant	Special Allegation	Alleg. Effect
1	PC666	16-2-3	ANDRADE, Leandro	PC667 (b)-(i)	MSP Check

The District Attorney of the County of San Bernardino, by this Information alleges that:

COUNT 1

On or about November 18, 1995, in the County of San Bernardino, State of California, the crime of PETTY THEFT WITH A PRIOR, in violation of PENAL CODE SECTION 666, a Felony, was committed by LEANDRO ANDRADE, who did willfully and unlawfully steal, take, and carry away the personal property of another, to wit, K-Mart, said defendant having been previously convicted of the crime of petit theft on March 7, 1990 in the Municipal Court of the Fullerton Judicial District of the State of California and having served a term therefor in a penal institution and having been imprisoned therein as a condition of probation for said offense.

It is further alleged as to Count(s) one pursuant to Penal Code section 667(b) through (i) that the defendant, LEANDRO ANDRADE, has suffered the following prior conviction of a serious or violent felony or juvenile adjudication: The crime of Residential Burglary, 3 counts in violation of section 459 of the Penal Code on and about the 26th day of April, 1983 in the Superior Court of the state of California, for the county of San Joaquin, Case Number 33894.

* * * * *

Pursuant to Penal Code Section lO54.5(b), the People are hereby informally requesting that defense counsel provide discovery to the People as required by Penal Code Section 1054.3.

THIS INFORMATION CONSISTS of 1 COUNT(S)

DENNIS L. STOUT
DISTRICT ATTORNEY
County of San Bernardino
State of California

By: /s/ David Bristow
DAVID BRISTOW
DEPUTY DISTRICT ATTORNEY

filed in Superior Court
County of San Barnardino
DATED:

SUPERIOR COURT ORDER GRANTING JOINT MOTION TO CONSOLIDATE CASE NUMBERS FWV0871 AND FWV09140

SUPERIOR AND MUNICIPAL COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
CRIMINAL MINUTE ORDER-2

ACIS Case No: Date: 3-13-96 Time: 8:30AM
Case No:FWV08781 Judge: Joan M. Borba
Clerk: Kristel Terry
Baliff: Blaine Proctor
Reporter: L. Miakovich
Counsel: DDA Ruzkowski
DPD Cruz

CASE TITLE: People v. Andrade, Leandro

CASE CUSTODY: ☐ OR ☒BAIL☐ CUSTODY
☐ FUGITIVE ☐ PROBATION _____

NATURE OF PROCEEDINGS:
☐ READINESS CALENDAR ☐ PRETRIAL CONFERENCE
☒ RECALL CALENDAR ☐CHANGE OF PLEA AT TIME OF _____
☐ DEFENDANt"S ☐ PEOPLE'S MOTION TO DISMISS PER 995 P.C. ☐ MOTION TO SUPPRESS EVIDENCE PER 1538 P.C. ☐OTHER: _____

Codes Omitted
□ Public Defender □ Appointed □ (A) Relieved
□ Attorney _____ _____
□ Retained □ (B) Appointed □ (E) Relieved
□ Interpreter _____
□ sworn □ ½ □ 1 Day
□ On Motion of: Court Trial is ⊠ (A) Trailed
⊠ to be ⊠ (B) Recalled on 3-18-96 at 10:30 AM
in Dept. A.
□ Action assigned to commence on _____
at _____ in Court _____
□ in Department _____ for
□ Jury Trial □ (A) Court trial.

□ Counsel stipulate Court may read and consider preliminary transcripts

---

Codes Omitted
□ PC 995 Motion held SCM02
□ PC 1538.5 Motion □ (A) Granted
□ Pretrial held SCCNF ⊠ Conference held
□Motions off calendar - - no briefs filed
□ Motion _____
□ 995 P.C. Motion (SCX 10)
□ 1538.5 P.C. Motion □ Granted □ (B) Denied
□ (E) Without prejudice □ (F) With prejudice
□ (G) Submitted
□ Motion to amend Complaint/Information
□ (A) Granted □ (B) Denied □ (c) waives any defects
□ (A) Amended information is ordered filed
□ (B) Defendant waives arraignment on amended information/complaint
□ Defendant waives Arbuckle rights

Codes Omitted
□ BY LEAVE OF COURT, Defendant personally and by counsel withdraws plea of not guilty to counts(s)
_____
□ Defendant is informed of the elements of the charge(s) □ Factual basis established
□ Defendant pleads □(A) Guilty □ (B) Guilty per Plea Bargain (incorporated by reference herein)
□ (C) Nolo Contender with consent
□ See filed Plea Form re: Courts inquiries, advisals of District Attorney and findings and agreements, approval of court
□ (D) To all charges and counts as alleged
□ (E) _____
□ Pleas to Felony SCX Pleas to Misd 17b
□ Pleas to Misd - other
□ Court finds Boykin & Tahl rules complied with

Codes Omitted
□ Defendant waives statutory time for:
□ (A) SCWVR Trial to _____
□ Sentencing
□ Defendant applies for Probation
□ (A) Ordered to report to Probation Officer
□ Referred to Probation Officer for presentence investigation and report
□ Defendant order to □ (A) Report to Probation Officer forthwith □ (B) Appear on hearing date
□ Defendant fails to appear as previously ordered
□ Court finds good cause for defendants absence and reserves jurisdiction over bailbond.

Codes Omitted
- ☐ Bench Warrant order recalled
- ☐ Quashed prior to issuance
- ☐ Bail/Bond exonerated
- ☐ Bench Warrant ordered issued
- ☐ Held until _____
- ☐ Bail/Bond forfeited

Codes Omitted
- ☐ Existing dates confirmed
- ☐ Estimated Trial Time _____
- ☐ Vacate _____ ☐ Reset _____
- ☐ Defendant released as to this action only
- ☐ On own recognizance upon signing agreement to appear
- ☐ Court takes Cruz Waiver from defendant
- ☐ Defendant remanded to lower Court.
- ☐ Action continued to ___ at ___ in Court _____ in Dept./Div. _____ for _____
- ☐ On motion of the District Attorney ____ dismissed.
- ☐ (A) in furtherance of justice ☐ (B) Per Plea Bargain
- ☐ (C) Pursuant to insufficient evidence to prosecute
- ☐ (D) _____
- ☒ Case custody ☐ Remains
- ☒ (A) Changes to Custody

SUPERIOR AND MUNICIPAL COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
MISCELLANEOUS MINUTE ORDER- ____

CASE NAME: ANDRADE, Leandro
ACIS CASE NO: _____
____ : FWV08781 Date: 3-13-96 Department: A___

Codes Omitted
- ☒ Court orders the defendant remanded defendant remanded into custody and increases bail to the amount of $50,000.00, over defense objection. Defense request for a stay to allow defendant until 3-18-96 to post additional bail bond denied.

People and Defense joint motion to consolidate case FWV 09140 with case FWV 08781 is granted.

People to supply discovery for case FWV09140 to Defense today.

Defense motion to strike expert witnesses testimony re: fingerprints is taken under submission.

Counsel ordered to return at 10:30 a.m. on 3-18-96 for pre-trial conference with jury selection commencing at 2:00 p.m.

VERDICTS AND SPECIAL FINDINGS

Filed in Court on Mar 21 1996

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

(for file stamp only)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
	)	VERDICT I-A
vs.	)	
LEANDRO ANDRADE, Defendant	)	

We, the jury in the above entitled action, find the defendant, LEANDRO ANDRADE, GUILTY of the crime of PETTY THEFT, as charged in the Information, as to Count I.

DATED: March 21, 1996

/s/ Deborah Freeman
Foreperson

Filed in Court on Mar 21 1996

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

(for file stamp only)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
	)	VERDICT I-A
vs.	)	
LEANDRO ANDRADE, Defendant	)	

We, the jury in the above entitled action, find the defendant, LEANDRO ANDRADE, GUILTY of the crime of PETTY THEFT, as charged in the Information, as to Count II.

DATED: March 21, 1996

/s/ Deborah Freeman
Foreperson

Filed in Court on Mar 27 1996

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

(for file stamp only)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
vs.	)	SPECIAL FINDING, I-A TRUE
LEANDRO ANDRADE, Defendant	)	

We, the jury in the above entitled action, find the Further Allegation that the defendant, LEANDRO ANDRADE, on or about April 26, 1983, was convicted of the crime of FIRST DEGREE RESIDENTIAL BURGLARY, in violation of Penal Code Section 459, when he entered a residence to commit a theft located at 3591 Quail Lakes, No. 275, Stockton, California, to be TRUE, as to Counts I and II.

Dated:

/s/ Bridgit F. George 3/27/96

Filed in Court on Mar 27 1996

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

(for file stamp only)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
vs.	)	SPECIAL FINDING, II-A TRUE
LEANDRO ANDRADE, Defendant	)	

We, the jury in the above entitled action, find the Further Allegation that the defendant, LEANDRO ANDRADE, on or about April 26, 1983, was convicted of the crime ofFIRST DEGREE RESIDENTIAL BURGLARY, in violation of Penal Code section 459, when he entered a residence to commit a theft located at 6415 Cumberland, Stockton, California, to be TRUE, as to Counts I and II.
Dated:

Dated:

/s/ Bridgit F. George 3/27/96

Filed in Court on Mar 27 1996

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

(for file stamp only)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff	)	Case No. FWV09140
vs.	)	SPECIAL FINDING, III-A TRUE
LEANDRO ANDRADE, Defendant	)	

We, the jury in the above entitled action, find the Further Allegation that the defendant, LEANDRO ANDRADE, on or about April 26, 1983, was convicted of the crime of FIRST DEGREE RESIDENTIAL BURGLARY, in violation of Penal Code section 459, when he entered a residence to commit a theft located at 2101 Rosemarie, No. 148, Stockton, California, to be TRUE, as to Counts I and II.

Dated:

/s/ Bridgit F. George 3/27/96

PROBATION REPORTS
SAN BERNARDINO COUNTY PROBATION
DEPARTMENT PROBATION OFFICER'S REPORT

Defendant's Name	Court	Judge	Court No.
LEANDRO ANDRADE	WVRTC-RC Dept. A	Joan M. Borba	ACIS - F0129056
Address	**Hearing Date**	**Attorney**	**Prob. No.**
1182 E. Grand Ave., #1 Ph. 469-9260	4-24-96	C. Cruz	0066971

Birth Date	POB	Nationality
6-6-58 AGE 37	Los Angeles, CA	American

Convicted By	Conviction Date	Court/Conv
Jury	3-27-96	WVRTC-RC, Dept. A

Ht	Wt	Eyes	Hair	Ethnic	Sex
5'8"	190	Brn	Black	Hispanic	Male

Arresting Agency	Booking Agency
Montclair PD	WVDC

SSN	BI	FBI	Custody Status
565-04-4467	A05468524	480657V9	Custody

Driver's License	State	Status	Convicted Charges
V8090170	CA	Valid	PC666; Petty Theft with a Prior, Felony PC 667(b) through (i)

Scars, Tatoos, Other Marks	Plea Agreement
Tatoos - Right Arm & Shoulder	N/A -Found Guilty by jury

Booking No.	Arrest Date	Release Date	Days
9511341642	11-18-95	1-23-96	67
9603341199	3-13-96	In Custody	42
Total Custody Days		Count 1	109*

PERSONAL HISTORY

(Not Independently Verified by Probation Department)

Education	Military	Special training
GED	U.S. Army**	Refrigeration

Health	Drugs/Alcohol/Medications
Good	Heroin

Treatment History	Employer
1993-Loma Linda V.A. Hosp. 6 mos	Unemployed

Time On Job	Income	Type of Work	Marital Status
N/A	None	Refrigeration	Single

Spouse	Children	Assets, Debts, Child Support
N/A	3	None

Contact Person: 629-9683 Marcy Gloria Andrade

Father (Name, Address, Ph.)	Mother (Name, Address, Ph.)
Inncent Andrade - Deceased	Leoanrda Varrbra 751 San Francisco Pomona, CA 629-4441

Additional Information: ** 9-years

Face Sheet Taken By: Vicky Foulks Extension: 945-4019

Date: 4-23-96

FWV 08781 ANDRADE, LEANDRO April 23, 1996

PRIOR RECORD: According to the California Bureau of Identification, the Department of Motor Vehicles, and the Federal Bureau of Investigation, the defendant has the following prior record:

DATE	AGENCY	OFFENSE	DISPOSITION
7-25-81	Pomona PD	1) H&S11350(a) 2) PC 484(a)	1-20-82 (A525050) 1) Drug Diversion 2) Convicted - misd 12 mon prob./ 6 days jail
11-30-82	Stockton SO	PC 459 10 counts	4-26-83: (32894) Convicted PC 459 felony 32 months prison 5 additional counts - 88 months prison
11-17-88	LaTuna Fed. Correctional Facility	Transportation of Marijuana	U.S. probation - Sacramento Convicted - felony 8 years prison
2-5-90	Fullerton PD	PC 666	3-7-90: Convicted PC 488 - misd 180 days jail
9-12-90	Lompoc Fed. Correctional	Transportation of Marijuana	9-12-90: Convicted - felony

	Facility		2191 days in federal prison
9-30-91	Santa Ana	Escape	11-5-91: Parole violation - returned to finish term 2-8-93: paroled

CIRCUMSTANCES OF THE OFFENSE: Specifics of the criminal offense and arrest of the defendant are detailed in the Montclair Police Department reports. The offense of Petty Theft with a Prior occurred on November 18, 1995. The defendant was arrested on November 18, 1995, and charged by the District Attorney's Office with Petty Theft with a Prior, in violation of Section 666 of the Penal Code, a Felony, Count 1, with special allegation of PC 667(b) through (i), Prior Serious Felonies.

Officers responded to K-Mart regarding a shoplifter in custody. Security watched the defendant place four videos in his rear waistband of his pants. The defendant exited the store not paying for the items. A uniformed security guard stopped the defendant outside the store. He was escorted back into the security office. He was arrested and booked at the West Valley Detention Center.

DEFENDANT'S STATEMENT: The defendant was interviewed on April 4, 1996, at the West Valley Detention Center. The defendant admitted committing the offense. The defendant further stated he went into the K-Mart Store to steal videos. He took four of them to sell so he could buy heroin. He has been a heroin addict since 1977. He says when he gets out of jail or prison he always does something stupid. He admits his addiction controls his life and he steals for his habit.

VICTIM'S STATEMENT: The victim in this matter is K-Mart Store who received their merchandise back at the time of the defendant's arrest.

COLLATERAL REPORTS: No collateral information has been received in this case.

SENTENCING CONSIDERATIONS:

Probation Eligibility (Rule 413):

Statutory provisions limiting or prohibiting a grant of probation in this matter do exist. Specifically, PC 1203(e)(4) in that the defendant has been convicted twice in the State of California of a felony.

Criteria Affecting Probation (Rule 414):

(a) Facts relating to the crime include:
(5) The degree of monetary loss to the victim was insignificant.
(8) The manner in which the crime was carried out demonstrated criminal sophistication and/or professionalism on the part of the defendant.

(b) Facts relating to the defendant include:
(1) The defendant does have a prior record of criminal conduct. That prior record does indicate a pattern of regular or increasingly serious criminal conduct.
(2) The defendant's prior performance on parole was unsatisfactory. The defendant was not on a grant of parole at the time he committed the present offense.
(5) Imprisonment will not seriously affect the defendant.
(6) A felony conviction will not adversely affect the defendant's life.

(7) The defendant has shown remorse.

Circumstances in Aggravation (Rule 421):

(a) Facts relating to the crime include:
(8) The manner in which the crime was carried out indicates planning, sophistication or professionalism.

(b) Facts relating to the defendant include:
(2) The defendant's prior convictions as an adult are numerous, and of increasing seriousness.
(3) The defendant has served a prior prison term.
(5) The defendant's prior performance on parole was unsatisfactory.

Circumstances in Mitigation (Rule 423):

(b) Facts relating to the defendant include:
(3) The defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process.

Enhancements:

Special Allegation or Enhancement of PC 667(b) through (i) was pled and proven. For the impact this Special Allegation has upon the defendant's custody time, the Court's attention is respectfully referred to the Probation Officer's Recommendation.

ANALYSIS: The defendant admits he is a heroin addict. He admits heroin controls his life. He was originally sent to prison in 1983 for several counts of burglay. He continued to have theft and drug problems. He continues to be a threat to the community. He is unemployed and does not help take care of his three children. He cannot take care of himself or anyone else. He admits it is wrong to steal but cannot help himself as he needs money for heroin.

This is the defendant's third strike and the probation officer

is bound by the law to recommend a sentence of twenty-five years to life as a result of the defendant's conviction and prior record.

As such, the following recommendation is made by the Probation Department.

CVC 13350 RECOMMENDATION: It is respectfully recommended the Court find a motor vehicle was not used in the commission of this offense.

REIMBURSEMENT OF APPOINTED COUNSEL: It is respectfully recommended the Court find that the defendant does not have the present ability to pay appointed counsel fee.

REIMBURSEMENT OF INVESTIGATION COSTS: It is respectfully recommended the Court find the defendant does have the present ability to pay the cost of conducting the Presentence Investigation and preparing of the Court Report pursuant to Section 1203.1b of the Penal Code. It is therefore recommended the defendant be ordered to pay $504.00 through the Central Collections.

REIMBURSEMENT OF ARRESTING AGENCY: It is respectfully recommended that the Court order the defendant to reimburse the City of Montclair, 5111 Benito St., Montclair, Ca. 91763, Attn: Finance Division pursuant to Government Code 29550.1, in the amount of $152.00 and show proof of payment to Probation Officer within ninety (90) days from release from custody.

RESTITUTION FINES: It is therefore respectfully recommended that the defendant, Leandro Andrade, be ordered to pay a Restitution Fine, pursuant to PC 1202.4 in the amount of $5,000.00, to be collected by the Department of Corrections.

It is further recommended that the defendant, Leandro Andrade, be ordered to pay a restitution fine, pursuant to PC 1202.45, in the amount of $5,000.00. It is further recommended

parole at which time the fine will be permanently stayed. This fine is to be immediately imposed upon any revocation of parole.

PROBATION OFFICER'S RECOMMENDATION: It is therefore respectfully recommended that probation be denied and the defendant, Leandro Andrade, be sentenced to the California State Prison for the term of twenty-five (25) years to Life for the offense of Petty Theft with a Prior, in violation of Section 666 of the Penal Code, a Felony, with the SPECIAL ENHANCEMENT of 667(b) through (i) found TRUE.

The commitment to State Prison is for a total of twenty-five (25) years to Life, with credit for time served, a matter of one hundred nine (109) actual days, plus fifty-four (54) conduct days, for a total of one hundred sixty-three days and may be followed by parole for a period of three (3) to four (4) years.

Respectfully submitted,
RAYMOND B. WINGERD
CHIEF PROBATION OFFICER

By:
/s/ Vicky Foulks
Probation Officer II

AF:ef

APPROVED:

/s/ Jon R. Allender
Jon R. Allender
Supervisor

I hereby certify that the Probation Officer's Report and Recommendation in this matter has been read and considered by me on this 23rd day of Apr., 1996.

/s/ Joan M. Borba
Judge of the West Valley Regional Trial Court,
In and for the County of San Bernardino,
State of California

SAN BERNARDINO COUNTY PROBATION
DEPARTMENT PROBATION OFFICER'S REPORT
Filed in Court on Apr 24 1996

Defendant's Name	Court	Judge	Court No.
LEANDRO ANDRADE	WVRTC-RC Dept. A	Joan M. Borba	FWV08781 ACIS - F0129056

Address	Hearing Date	Attorney	Prob. No.
1182 E. Grand Ave., #1	4-24-96	C. Cruz	0066971

Birth Date	POB	Nationality
6-6-58	Los Angeles, CA	American

Convicted By	Conviction Date	Court/Conv
Jury	3-27-96	WVRTC-RC, Dept. A

Ht	Wt	Eyes	Hair	Ethnic	Sex
5'8"	190	Brn	Black	Hispanic	Male

Arresting Agency	Booking Agency
Montclair PD	WVDC

SSN	BI	FBI	Custody Status
565-04-4467	A05468524	480657V9	Custody

Driver's License	State	Status	Convicted Charges
V8090170	CA	Valid	PC666; Petty Theft with a Prior, Felony – 2 counts

Scars, Tatoos, Other Marks	Plea Agreement
Tatoos - Right Arm & Shoulder	N/A -Found Guilty by jury

Booking No.	Arrest Date	Release Date	Days
9511341642	11-18-95	1-23-96	67
9603341199	3-13-96	In Custody	42
Total Custody Days		Count 1	109*

PERSONAL HISTORY
(Not Independently Verified by Probation Department)

Education	Military	Special training
GED	U.S. Army**	Refrigeration

Health	Drugs/Alcohol/Medications
Good	Heroin

Treatment History	Employer
1993-Loma Linda V.A. Hosp. 6 mos	Unemployed

Time On Job	Income	Type of Work	Marital Status
N/A	None	Refrigeration	Single

Spouse	Children	Assets, Debts, Child Support
N/A	3	None

Contact Person: 629-9683 Marcy Gloria Andrade

Father (Name, Address, Ph.)	Mother (Name, Address, Ph.)
Vincent Andrade - Deceased	Leoanrda Varrbra 751 San Francisco Pomona, CA 629-4441

Additional Information: ** 9-years

* Count 2: 9511240406 11-4-95 11-7-95 4 days
Per the D.A., this count was first filed under FWV 09140. She made an oral agreement in court to refile this count under FWV 08781

Face Sheet Taken By: Vicky Foulks Extension: 945-4019
Date: 4-23-96

PROBATION OFFICER'S SUPPLEMENTAL REPORT
LEANDRO ANDRADE
In custody
April 24, 1996
Attorney: Christian Cruz

FWV08781
0066971

CIRCUMSTANCES OF THE OFFENSE:
COUNT 2: On March 27, 1996, the defendant was found guilty by jury trial of two unrelated counts of PC 666, Petty Theft with a Prior, both Felonies. The jury also found true the allegation of PC 667(B) through (i), three prior serious felonies. The case was then referred to the probation officer for a presentence investigation and report.

The original Amended Information filed by the district attorney reflected that Count 1, however, made no mention of Count 2 which reportedly was orally consolidated into this case in court by agreement of the district attorney and public defender.

Consequently, the probation officer was unaware of Count 2 when the original probation report was prepared as the minute order dated March 27, 1996, also did not reflect a jury finding as to Count 2.

The purpose of this supplemental report is to submit a corrected face sheet and recommendation.

FWV08781 ANDRADE, LEANDRO April 24, 1996
RESTITUTION FINES: It is therefore respectfully recommended that the defendant, Leandro Andrade, be ordered to pay a Restitution Fine, pursuant to PC 1202.4 in the amount of ~~$10,000~~ $200.00 to be collected by the Department of Corrections for the offenses of Petty Theft with a Prior, a Felony, 2 counts.

It is further recommended the defendant, Leandro Andrade, be ordered to pay a Restitution Fine, pursuant to PC 1202.45 in the amount of ~~$10,000~~ $200.00. It is further recommended that said order be suspended pending successful completion of parole at which time the fine will be permanently stayed. This fine is to be immediately imposed upon any revocation of parole.

PROBATION OFFICER'S RECOMMENDATION: It is respectfully recommended that probation be denied and the defendant, Leandro Andrade, be sentenced to the California State Prison as follows:

Count 1: Petty theft with a Prior, in violation of Section 666 PS With Special enhancement of PC 667 (b) through (i) found true ..... 25 years to Life

The commitment to State Prison is for a total of twenty-five (25) years to Life, with credit for time served, a matter of one hundred nine (109) actual days, plus fifty-four (54) conduct days, for a total of one hundred sixty-three (163) days and may be followed by parole for a period of five (5) to seven (7) years.

Count 2: To be consecutive to above; Petty Theft with a Prior, in violation of Section 666 PC with special enhancement of PC 667(b) through (i) found true ..... 25 years to Life

The commitment to State Prison is for a total of twenty-five (25) years to Life, with credit for time served, a matter of four (4) actual days, plus two (2) conduct days, for a total of six (6) days and may be followed by parole for a period of five (5) to seven (7) years.

Pursuant to PC § 667 (e)(12)

FWV08781 ANDRADE, LEANDRO April 24, 1996

Respectfully submitted,

RAYMOND B. WINGERD
CHIEF PROBATION OFFICER

By: /s/ Vicky Foulks
Probation Officer II

VF:ef

APPROVED:

/s/ Jon R. Allender
Jon R. Allender
Supervisor

I hereby certify that the Probation Officer's Report and Recommendation in this matter has been read and considered by me on this 24th day of Apr. 1996.

/s/ Joan M. Borba
Judge of the West Valley Regional Trial Court
In and For the County of San Bernardino,
State of California

TRANSCRIPT OF SENTENCING HEARING

[454] RANCHO CUCAMONGA, CALIFORNIA
WEDNESDAY, APRIL 24, 1996; 9:07 A.M.
DEPARTMENT A (RC) HON. JOAN M. BORBA, JUDGE

APPEARANCES:

(Appearances as heretofore noted.)
(Lynette Milakovich,
Official Reporter, C-5098.)

THE COURT: People versus Andrade, FWV-08781. Please state your appearances.

MR. CRUZ: C. Christian Cruz for Mr. Andrade who is present in custody, your Honor.

MS. RUSZKOWSKI: Agnes Ruszkowski on behalf of the People, your Honor.

THE COURT: All right. Please proceed, Ms. Ruszkowski.

MS. RUSZKOWSKI: Thank you, your Honor.

The Court asked me to respond to a motion filed by defense counsel entitled an Arrest of Judgment, and People begin by pointing out the use note to CALJIC 17.26.

The use note indicates that it is the committee's position that whether a prior conviction was a felony or misdemeanor or a serious or violent felony is an issue of law for the Court to determine. The jury's role is to determine whether this defendant was previously convicted of a particular crime regardless of its characterization

as a serious or violent one.

In this case the jury returned three special findings or verdict forms indicating that they found that on or [455] about April 26, 1983, the defendant was convicted of first degree residential burglary in violation of Penal Code Section 459 when he entered a residence to commit a theft located – and there's various addresses.

Prior to court today, this Court already made a specific finding that all three prior convictions qualify under the three strikes law because they fit the definition of Penal Code Section 1192.7(c)(18), which is burglary of an inhabited dwelling.

Counsel's motion entitled Arrest of Judgment is really a motion asking this Court to reconsider its prior finding. And from what the People can glean, the basis of counsel's motion is two fold: One, that the People did not prove that the alleged burglaries were one of inhabited dwellings and, two, committed at nighttime, and that therefore they should not be treated as strikes pursuant to Penal Code Section 667(d)(1)/1192.7(c)(18).

The People strongly disagree. The People still feel that these priors should be treated as strikes pursuant to Penal Code Section 667(d)(1) and 1192.7, and again the question before this Court is one of law for this Court to decide.

In deciding whether these three priors meet the criteria of being serious felonies as defined in Penal Code Section 1192.7, the Court is allowed to look at the entire record, and I do have case law for the Court with specific citations.

In People versus Guerrero, G-u-e-r-r-e-r-o, a [456] 1988 California Supreme Court decision, 44 Cal. 3d 343, the Supreme Court specifically held that in determining the truth of a prior conviction, the trial Court may look to the entire record of that conviction, and therefore it was proper for the trial Court to look beyond the judgments to determine whether the defendant's prior conviction – or prior convictions were for residential burglary.

Subsequent case law that has interpreted People versus Guerrero has specifically allowed the Court to look at the following things: One, the abstract of judgment; that case is People versus Colbert, C-o-l-b-e-r-t, 1988 case, 198 Cal. Ap[p]. 3d, 924 at page 930; two, the charging document and the change of plea form, and that's People versus Carr, C-a-r-r, a 1988 case, 204 Cal. Ap[p]. 3d 774 at page 778; three, the defendant's admission and a Tahl form and transcripts of the sentencing hearing.

THE COURT: What was the last part of the Carr cite, please?

MS. RUSZKOWSKI: 204 Cal. Ap[p]. 3d 774 at page 778.

THE COURT: Thank you.

MS. RUSZKOWSKI: Three, the defendant's admission in a Tahl waiver form and transcripts of the sentencing hearing; that's People versus Smith, 1988, 206 Cal. Ap[p]. 3d 340 at page 345; four, a minute order reflecting a no contest plea; that's People versus Harrell, H-a-r-r-e-l-l, a 1989 case, 207 Cal. Ap[p]. 3d, 1439 at page 1444; [457]

five, Penal Code Section 1203.1, statements of use by the judge and the prosecutor; that's People versus Johnson, 1989, 208 Cal. Ap[p]. 3d 19 at page 25;

six, the defendant's admissions in a probation report; People versus Garcia, 1989, 216 Cal. Ap[p]. 3d, 233 at page 237;

seven, the defendant's admissions in the transcript of a change of plea hearing; that's People versus Abarca, A-b-a-r-c-a; I don't have the year, but it's 233 Cal. Ap[p]. 3d at page 1351; and, eight, rap sheets are admissible to prove the fact rather than the substance of the prior, and that's People versus Dunlap, D-u-n-l-a-p, a 1993 case, 18 Cal. Ap[p]. 4th, 1468.

I would also point out to the Court that subsequent case law has also found certain documents not part of the record of conviction, and that would be, one, the Department of Corrections commitment, and that's People versus Rhoden, R-h-o-d-e-n, a 1989 case, 216 Cal. Ap[p]. 3d, 1245, and, two, the state and local rap sheets in order to prove the substance of a prior, and that would be People versus Mathews, 1991, 229, Cal. Ap[p]. 3d, 930.

THE COURT: One more time with that citation, please.

MS. RUSZKOWSKI: 229 Cal. Ap. 3d 930. In this case the People submitted court documents from the Superior Court of San Joaquin in order to prove the prior convictions. I don't recall what exhibit [458] number they were, but they consisted of several different pages and different sheets. It consisted of, one, an information, two, a minute order dated March 28, 1983.

And if the Court were to review the minute order dated March 28, 1983, the Court would see that the Court fixed the degree of the offense as first degree, and there is a box checked at 30524, and under People versus Harrell, H-a-r-r-e-l-l, previously cited, a minute order is something the Court can look at.

Besides the information and the minute order, there is also a transcript

of a plea dated March 28th, 1993, and there was a factual basis taken for the plea based on the preliminary hearing transcript which the Court had reviewed. And pursuant to People versus Abarca, previously cited, that is something also the Court can consider.

Also there was an abstract of judgment, and pursuant to People versus Colbert, that is admissible. And the abstract of judgment specifically fixes the offense as first degree residential burglary for all four of those counts, referring to Counts 4, 5, and 6.

Finally, there's a sentencing transcript dated April 26, 1983 which also makes clear that this is a first degree residential burglary pursuant to People versus Smith, previously cited, the Court can consider the sentencing transcript.

And I would point out on page three of the sentencing transcript, defense counsel indicates, lines 18 through 24, "Okay, fine, I would just like then the [459] probation officer's official report that is filed in this matter to reflect that the defendant did enter pleas to burglary of the first degree to five counts as opposed to six counts."

Also page six of the sentencing transcript indicates the Court uses the term "first degree," and that is lines one through four. The defendant having been convicted by plea – this is as to Count 4 of the violation Section

459 of the Penal Code are burglary in the first degree.

That same page, pages six through seven, lay out the sentencing in this case, and Count 4, according to the sentencing transcript, indicates that the Court impose the upper term of six years on Count 4; on Count 5 the Court impose the middle term of four years consecutive but stayed 32 months. So what the Court really did was impose one third of the mid term and ran it consecutive. And as to Count 5, the middle term is what the Court imposed four years running concurrent.

If the Court looks at the 1982 Penal Code, Penal Code Section 461 lists the punishment for burglary in the first degree as two, four, and six years state prison. And then it goes on to say that punishment for burglary in the second degree county jail is appropriate not exceeding one year or state prison.

If the Court were to then look at Penal Code Section 18, it states that where a different punishment is [460] prescribed by law, every felony offense or an offense punishable by state prison is punishable by 16, two, or three years based on these two code sections, first degree residential burglary would be a two, four, six; second degree would be a 16, two, three. So the Court can see that the sentence imposed was a first degree residential burglary sentence.

In this case the minute order dated March 28, 1983, the abstract of judgment, the sentencing transcript, all indicate that the defendant pled guilty to first degree residential burglary, and he was sentenced according to first degree residential burglary.

Counsel now raises the question whether the defendant's convictions for first degree residential burglary qualify as strikes pursuant to Penal Code Section 667(d)(1) and Penal Code Section 1192.7.

So the People's position is that the defendant is asking this Court again to decide whether or not they are serious felonies.

The problem here is that although the information uses the term "first degree residential burglary," Penal Code Section 1192.7(c)(18) lists burglary of an inhabited dwelling as a prior which qualifies as a strike. And the People have shown that this is an inhabited dwelling, and that is what the defendant was convicted of by virtue of the definition in Penal Code Section 460 as defined in 1982.

In 1982, Penal Code Section 460 defines [461] burglary in the first degree as burglary of an inhabited dwelling committed in the nighttime, so it has to be an inhabited dwelling and committed in the nighttime in order to qualify as a first degree residential burglary in 1982.

Therefore, the two definitions match.

As the Court can see, the 1982 Penal Code Section 460 requires three elements to prove first degree residential burglary: One, a burglary; two, an inhabited dwelling; and, three, had to be committed in the nighttime.

That changed in 1983, and Penal Code Section 1192.7 – and I'm relying on a 1995 Code – only requires two elements, and that's burglary and an inhabited dwelling.

In Gonzales versus Superior Court, 1995, 37 Cal. Ap[p]. 4th 1302 as modified in 39 Cal. Ap[p]. 4th 583, A, B, and C, that case specifically held that the three strikes law applies to prior felony convictions which fit the definition of serious or violent on June 30th, 1993, even though they were neither serious nor violent felonies at the time of the prior conviction.

So in this case, based on the Gonzales case, all the People need to do is prove burglary and an inhabited dwelling pursuant to 1192.7. That is the controlling factor. And the People have proved that by, again in summary, by the minute order where the Court fixed the degree as first degree, by the information which indicates the defendant entered with intent to steal, by the transcript where the Court relies on facts where the Court [462] relies on a preliminary hearing transcript for a factual basis, the abstract of judgment

which lists it as a first degree, and the sentencing transcript dated April 26, 1983, and Penal Code Section 461 which defines residential burglary as burglary of an inhabited dwelling.

All these documents together show that the defendant pled guilty to a first degree residential burglary, and pursuant tot Section 460 which defines residential burglary as burglary of an inhabited dwelling, the People have met their requirements of 1192.7(c)(18).

And with that, we would submit it.

THE COURT: Mr. Cruz.

MR. CRUZ: I'll try and respond accordingly.

If I understand counsel's argument, she's saying if the Court looks at all the documents submitted to the Court, it will find defendant was sentenced according to the provisions for a first degree burglary.

We have often seen abstracts from state prison come back for clarification because the wrong sentence was imposed for the inappropriate charge. So do we just look at the sentence and say because the sentence is consistent with the first degree that it must be a first degree? Well, even counsel's own argument doesn't say that. And she says what's required to show is that there was a burglary of a, quote, unquote, inhabited dwelling. And if we look at all the documents that we have in this case, we don't have that.

The first document generated would have

been in fact the information, and the information does not [463] allege -- the information from San Joaquin County alleged that in fact the, quote, unquote, residences as they are called, were in fact inhabited dwellings.

The exact language contained in the informations are that it's a residence located at 3591 Quail Lakes Drive, No. 275, and that is almost the exact verbatim language in Count 5 and also in Count 6. Nothing indicating that this in fact is an inhabited dwelling.

So what counsel is trying to do is say if in fact defendant was sentenced as a first degree and there are some documents that say it was a residential burglary, because the definition for first degree burglary at the time included both nighttime and inhabited dwelling, that that should be sufficient to establish both of those elements.

Well, the one case that counsel has failed to give the Court is the case of Jackson, and Jackson says --

MS RUSZKOWSKI: Counsel, do you have the cite?

MR. CRUZ: Yes, I do.

Jackson is a California Supreme Court case. It's 37 Cal. 3d, 826. And Jackson held that in order to give retroactive effect to the enhancement provisions of Penal Code Section 667(c)(18) of 1192.7, it was interpreted as, quote, referring not to the specific criminal offenses, that is, whatever may be shown on the documents or the in fact minute orders but to the criminal conduct described therein and applicable whenever the prosecution separately pleads and proves that conduct.

[464] So what counsel is trying to say is if the charge says first degree, that is sufficient. That's not the law. The law says that conduct must in fact be charged and proven.

For example, if we take in fact the charging documents which are used in our own county - - if I might approach, you Honor.

THE COURT: Yes.

MS. RUSZKOWSKI: Counsel, could I see?

MR. CRUZ: I have a copy for counsel as well.

THE COURT: Thank you.

MR. CRUZ: Thank you.

The first case on top is a felony complaint filed by the People of San Bernardino County in the case of one Oscar Rolando Perez dnd Gilberto Martinez Careaga. In here it alleges a burglary in violation of Penal Code Section 459, a felony was committed by the names persons who did willfully and unlawfully enter a detached residential garage.

But what is a detached residential garage? We all know that that does not qualify as a first degree burglary because by law the garage must be attached to the house.

If counsel has done her homework, she would find that 459 first degree burglary has always been historically defined as a crime against habitation, not against property.

So it is in fact that it is an inhabited [465] dwelling which makes it a first degree. Not surprisingly, in 1982 what was required was a showing that in fact was an inhabited dwelling

which is not shown either in the information from San Joaquin County nor in the change of plea where there was never an allegation nor an admission that in fact this was an inhabited dwelling.

Do we then say take residential garage and say because the word "residential" is used, that that alone raises this to a first degree burglary? And the answer is, of course, no. We don't operate that way.

Looking at the next page of the felony complaint as filed by the District Attorney's Office in the West Valley, here is the most appropriate language that should be used for a first degree burglary. It alleges a first degree residential burglary, but they don't stop there. They state that this person, a Timothy William Norris, did willfully and unlawfully enter, quote, and inhabited dwelling house and trailer coach, inhabited portion of a building occupied by Elaine Carney. What they do is they in fact state the required elements to make it appropriate under (c)(18) because residential by itself does not qualify. (C)(18) of 1192.7, to make this a third strike does not use the word "residence." It says an inhabited dwelling. And that is the exact same language required in 1982.

And in addition to that, we have a named victim. We have Elaine Carney as being the person whose habitation was in fact violated.

[466] If we look at the information that was filed in San Joaquin County for Counts 4, 5, and 6, the Court will note there is no alleged victim in any of those counts as the D.A. has in fact done here, nor is there any mention in any of these counts that in fact was an inhabited dwelling.

If we look at the Penal Code Section for 1982, it was possible to commit a burglary of a house or an apartment. I realize a house can be bought and converted and can do other things that in fact be a residence. In my limited experience in life, I have never seen an apartment in use for other than in fact being a residence.

If we take the People's argument to its ultimate conclusion, if Kaufman and Broad were building homes down the street here on Civic Center Drive, and they were completed and ready for sale, and someone broke into those houses before they were sold and stole something from the house, would that be a residential burglary because it in fact is a residence? The answer is no because the People have to prove that it's an inhabited dwelling. So the fact alone that it's a residence does not make it a first degree burglary.

What if in fact that house had been in fact sold to a speculator who has no intention whatsoever of living in that house? He's going to rent it out. Would that make it a first degree burglary? Again no because the law requires that it be an inhabited dwelling.

And in fact the law on the case comes from our own 4th District. It is the case called Cardona, [467] 142 Cal. Ap[p]. 3d 481. Without a showing of an inhabited dwelling, it is insufficient for a first degree burglary.

And counsel's argument that simply using the word "residence" alone makes it a first degree burglary or in fact transposes it or somehow magically makes it into a first degree is insufficient.

The law requires the People as a fact of the conduct, not of the crime alleged, to in fact prove

that the residence was in fact inhabited.

The Penal Code Section 1982 required that allegation in the information and also that that allegation be pled at the change of plea.

Penal Code 1192.7(c)(18) -- if the Court recalls, I asked the People to in fact make an election to in fact state what it was exactly they were alleging was specific enough for this to make it a three strikes. They said (c)(18). I asked the Court for a special finding on that, and the Court did not.

I then was handed this morning, for example, a copy of the amended probation report, and the probation report does the same error that everybody else does. It says the jury also found true the allegation of P.C. Section 667(b) through (i). That was never given to the jury to decide whether or not these prior alleged offenses qualify under 1192.7(c)(18). They were told, here are the prior convictions, here's the exact language what the defendant pled to. The probation office goes off and says it's already been proven that these are in fact [468] strikes.

Counsel is also under the misapprehension that the Court has already ruled that these are in fact strikes. If that's the issue, then why do we give it to the jury to see if these are true writings? The jury decides whether or not in fact they were found pled and proven. The facts as given to the jury is what controls the Court here today.

What the jury found was the defendant had pled to the language contained in the information and pursuant to the plea. Is that sufficient at this time for the Court to find that those were first degree inhabited dwelling residences? And I submit to the Court that based upon what the jury

found and based upon the specific language contained in the People's exhibits, the Court is bound and cannot now find that somehow there is additional information which the Court can utilize to in fact overturn what the jury has found.

Even if we look at the additional documents, the minute order, the dockets, the Court knows from experience, first we have an information that informs the defendant of what he's charged with, and then we have a change of plea, and the defendant has no participation whatsoever in the preparation of a minute order nor an abstract of judgment nor any of those other documents in which counsel does not participate.

Now, People state that, well, counsel stated and the Court stated, but the question is, if we look at the change of plea entered by defendant and what he admitted, he [469] himself admitted -- he did not admit that it was residential.

Is a lawyer's statement binding upon the defendant? And in that regard, 1192.5 of the Penal Code requires that in fact there be a factual statement made by the Court to the defendant and defendant agree with that.

That's what happened in this case. The Court read the charges to the defendant, and the defendant admitted only what was in that information.

For the Court to say or for counsel to argue that whatever the defense lawyer stated would in fact be binding upon the defendant is contrary to the law.

And in fact for an attorney in 1982 to look at an information which is defective because it fails to show first degree burglary would in fact, based upon what the Court has right now before it, the

documents submitted by the People, that would be ineffective assistance of counsel. How could a lawyer in good faith in 1982 or even today stipulate that his defendant has pled to a first degree burglary when the information does not allege that? That's ineffective assistance of counsel.

If the Court wants some case to back that up with, I believe I do have two cases. The cases which in fact state that counsel may not do that is the case of People versus Watts, 67 Cal. Ap[p]. 3d 173, and also the case more importantly of Tigner, People versus Tigner, T-i-g-n-e-r, 133 Cal. Ap[p]. 3d 430, 435.

To summarize the crime or the facts of the [470] crime, the conduct of the crime, it needs to be stated in the information so that defendant has knowledge of what he's being charged with. 1192.5 requires the Court to inform the defendant and establish as a factual basis what it is defendant is in fact pleading to. That is found in the change of plea.

And what the Court read to the defendant and what he admitted was the same thing found in the information which is -- or does not contain any allegation of a nighttime entry nor an inhabited dwelling.

Counsel's argument is that, well, if defendant was sentenced to do a term which is consistent with first degree burglary, it doesn't matter what's on the information; it doesn't matter what's on the change of plea; the Court should ignore the information, ignore the change of plea, and look to what he was sentenced to do.

But the law in Jackson says no. The facts must be both supported by the People and shown

by the People -- in fact the specific language is that the conduct described therein when the prosecution separately pleads and proves that conduct, and I would note for the Court we're talking about conduct, not about an offense. So we can't take it and say it's a first degree burglary; do you plead guilty to that? That's insufficient. The Court must in fact take the elements separately and see if the defendant pleads to that. That was not charged. It was not admitted. And, therefore, it's not a first degree burglary.

And -- I have a lot more to say. I've been [471] doing a lot more research obviously.

THE COURT: I can tell. I'm impressed with both your arguments.

MR. CRUZ: I'll submit for right now.

THE COURT: Thank you for the work that both of you have put into this.

MS. RUSZKOWSKI: I've got the citations on a separate sheet of paper if the Court or court reporter needs them.

THE COURT: I do believe I have them. Do you have any response to what Mr. Cruz has said?

MS. RUSZKOWSKI: 1192.7 was not in existence in 1982. These offenses were committed in 1982. The defendant pled in 1983. The difference in the wording in the information is due to the fact in 1983 you didn't need nighttime. So that's

one of the differences.

And Penal Code Section 460 defines first degree residential burglary as burglary of an inhabited dwelling. There's a difference between what the People have to prove in trial, all the elements, and the fact there is a conviction.

I have not looked at the Jackson case. I'll look at it after we adjourn or recess.

But, you know, there's a difference between having to go and prove every single element and then proving that the defendant was convicted of first degree residential burglary, and I think all the paperwork in conjunction show [472] that it's first degree residential burglary, and 460 defines it as burglary of an inhabited dwelling.

Based on the Gonzales case previously cited, what is controlling is whether or not it would qualify as a serious offense at this time, and the fact that it's an inhabited dwelling by definition and it's a burglary qualifies.

And with that, I would submit it, you Honor.

MR. CRUZ: May I respond to that very quickly?

THE COURT: Yes.

MR. CRUZ: Counsel is correct. In 1982, 667 and 1192.7 did not exist. They were created after. There's a small problem with that. I don't know if the

Court realizes that. There was no such provisions for prior serious in 1982. They came later.

There's a small ex-post facto problem with that. Counsel has pointed it out. I think the Court should be aware of that.

Counsel is not, I think, contesting the fact that a 1982 offense, because it was pled to in 1983, therefore, the elements are different and are judged by 1983 standards. I don't think counsel is arguing that. I don't think she'll go that far to argue that. It's a 1982 offense. The law was changed in 1983 to eliminate nighttime. There was no change in whether or not it was an inhabited dwelling. That was both in 1982 and in 1983.

So the applicable standard, even though the plea was in 1983, was still to the charged offenses as the [473] law prescribed in 1982 which required nighttime.

Counsel's argument that -- I think she's saying that dwelling equals residence. I'm not sure she's really articulated that at this point. If she's saying that, then I have more cases for the Court to look at.

At this point I will just state this and make it very simple. If the Court wants to address that later on separately, we can do that. In 1982 it was required to show an inhabited dwelling house. In 1983 and in 1996 that's still required. There has been no change in that whatsoever.

What I have tried to show the Court from even the pleas, the felony complaint in this county, is simply saying residence by itself is not sufficient, and the D.A. knows that.

They have to in fact allege an inhabited dwelling, and the best way to do that is to say so

and also to put an alleged victim. Those things are not contained in any of the paperwork the Court has.

So my last argument basically is that the People are going to argument basically is that the People are going to argue that dwelling equals residence. That's not established by the Penal Code Section in 1982, nor today. Those are the elements that are required.

Cardona, of course, lays it out from the Fourth District that that has to be established. If the Court looks at detached residential garage, it's obviously simply saying residential garage, detached or otherwise, does not make that a first degree burglary. I'll leave it [474] up there. But if the Court wants to address the issue about whether or not residence is equal to dwelling, I have cases on that issue as well.

THE COURT: Thank you. All right. I'm going to take one case, and then I'll take the conference, and we'll come back at eleven o'clock, and I'll rule on this.

MS. RUSZKOWSKI: Does the Court want my Penal Codes? I mean they're not mine, but you are free to use one of mine if the Court would so desire, from 1982 and 1983.

THE COURT: Yes. That would be helpful.

(Recess.)

THE COURT: People versus Andrade, FWV-08781.

Mr. Andrade is present in custody represented by counsel. The People are represented.

I have read and considered the cases cited by counsel. I have reviewed the exhibits.

The motion for Arrest and Judgment is denied.

MR. CRUZ: May I get a chance to respond before the Court's ultimate ruling?

THE COURT: That was my ruling. Do you have more to offer?

MR. CRUZ: Well, I just wanted to know if the last question that I have for the Court was the People had not argued that residential was the same as inhabited dwelling, and I don't know if the Court wanted me to address that because I did have cases on that issue, and I wanted to address that if the Court felt that that was going to be an [475] issue that needed to be resolved.

THE COURT: Well, I have read the exhibits and the case law, and I am satisfied that that argument was addressed by Ms. Ruszkowski and by the cases that I have read, and I have had an opportunity, as I said, to read the exhibits. If you want to make your record, Mr. Cruz.

MR. CRUZ: Well, I wasn't quite sure because I asked the Court before if when the People made that argument, if that's an issue for the Court, I need to address it.

I can tell the Court very quickly that there are a couple of cases that would help the Court in that area if that is something the Court is going to

- -

THE COURT: Well, you did cite a couple of cases which discuss that --

MR. CRUZ: Well, I think People's - -

THE COURT: - - tangentially at least.

MR. CRUZ: Tangentially but not directly. There are a couple of cases that address that very specific issue. If the People made that argument and if the Court think they made that argument, I have some cases for the Court that say that's not proper, and I can tell the Court why that's not proper.

THE COURT: All right. Why don't you proceed.

MR. CRUZ: In an abundance of caution in case the Court is saying that in fact residential is the same as inhabited dwelling, I would note for the Court, the People talked about the case of Harrell. In Harrell, [475] H-a-r-r-e-l-l, the language that was used in Harrell that was gleaned by the Court from the information that was filed in the Superior Court was the language, quote, unquote, the residence of Steven Lewis. There was in fact a named victim of the residential burglary, first degree, vis-a-vis the inhabited dwelling portion. There it was somebody's residence.

I then went and looked at the cases that Harrell used in their reasoning, and the first case is the case of Deay, D-e-a-y, 194 Cal. Ap[p]. 3rd 280. Deay is a First Appellate opinion. There is a concurring opinion by Justice Sims. And

although he joins the majority in the ultimate resolution of the case, he felt compelled to write a concurring opinion on one specific issue, and that was whether or not residential should be evaluated with inhabited dwelling.

And his position was that that was improper for the Court to do so, that it was dicta for the Court to do so, and he expressly noted that there was language in the Deay case which was, quote, unquote, an inhabited dwelling and residence as contained in the information as well.

So he stated we need not say residence is the same thing as inhabited dwelling because we have in fact information before us that this was an inhabited dwelling.

Then he says -- we really talked about this already before -- look at the case of Brady, and Brady is 190 Cal. Ap[p]. 3d 124, where he says what brings the offenses within P.C. Section 667 and 1192.7 is the specific language [477] that there's a first degree burglary of, quote, an inhabited dwelling. Without that specific language, there is no inclusion within P.C. Section 667 and 1192.7.

And then, of course, he refers in Brady to the Jackson case in which he says that the People must plead separately and prove that conduct in order for it to fall within (c)(18).

So I just wanted to make sure that there was a lot of case law that stated simply saying residence or alleging residence by itself does not satisfy the provision of (c)(18) and of 1192.7 and P.C. 667 because what is required and what the specific language in Section (c)(18) states is burglary of an inhabited dwelling, not of a residence.

So I don't know if that makes any difference to the Court, but I wanted to make sure that that got addressed.

THE COURT: Thank you.
Do you have any response to that, counsel?

MS. RUSZKOWSKI: Yes, your Honor.

In 1982, Penal Code Section 460 and 461, the only time you could have a first degree residential burglary is if it was an inhabited dwelling. No other dwelling qualified. It had to be an inhabited dwelling.

And with that, we would submit it. I think the case law that counsel cited deals when the statute was expanded to include other types of dwelling. And in 1982 the only thing that qualified as a first degree was an [478] inhabited dwelling.

MR. CRUZ: And I don't disagree with counsel that what satisfied in 1982 a first degree burglary was an inhabited dwelling. But Jackson states that simply calling it a first degree burglary is insufficient to establish that in fact the prior is of an inhabited dwelling. Jackson requires that in fact there be language, and that's why I brought forward the information which the D.A.'s Office uses in this county, there must be an allegation of an inhabited dwelling and in fact an admission that it's an inhabited dwelling.

What counsel's argument has been has been to say if we look at everything but the information, if we look at everything but the

change of plea, we see that it seems to be a first degree burglary. She is exalting form over substance. She's saying, we have these boxes marked off presumably by a clerk somewhere, so, therefore, that in and of itself should be sufficient for the Court to say, if it looks like a first degree burglary, it should be a first degree burglary.

However, there's no support for that argument by counsel, not if she has evaluated Penal Code Section 1192.5 which states the requirement that the factual basis for the plea must be stated on the record. The record that we have here of the information and the change of plea is deficient as to those two aspects, nighttime and inhabited dwelling.

So the argument is if we look at the sentence [479] and we look at the minute order and we look at those things, that shows a first degree burglary. She hasn't answered the question: Does it show of an inhabited dwelling? She says, no, it shows a first degree burglary. We're not concerned with first degree or second degree. That is a red herring by counsel. A second degree residential burglary could also qualify as a prior. What has to be established is that this is in fact of an inhabited dwelling.

For example, January 26, 1996, the most recent case to talk about this was the case of People versus Moenius, M-o-e-n-i-u-s, and that was just published, and the Court will find it in the Daily Appellate Report.

MS. RUSZKOWSKI: Counsel, I reviewed that case. A petition for hearing has been granted April 11th, 1996.

MR. CRUZ: All right. The Court can then look at it in terms of just information. It has no controlling authority.

In that case it was an admission to the second degree residential burglary.

MS. RUSZKOWSKI: Your Honor, I believe if the case has been cited and hearing has been granted, I don't believe we can discuss it. -

MR. CRUZ: I believe the Court can discuss it. It has not been depublished. Therefore, it's on review, and the Court is looking at it. It doesn't mean that the Court cannot look at it nor refer to it when the issues are raised nor the issue be raised. [480]

THE COURT: I think I have enough information, Mr. Cruz, without going into that case at any rate.

Ms. Ruszkowski, do you have a response?

MS. RUSZKNOWSKI: Just very briefly, your Honor.

The People have looked at People versus Jackson, and what happened there was the prior alleged a second degree burglary, and the People were trying to prove that it was residential burglary. So they couldn't just look at the degree. They had to look into the words.

In our case it's consistent. It's one of our own convictions from the state of California, and the Court has the code, and the only thing that qualified was an inhabited dwelling

first degree residential burglary.

The other thing I would point out - - and this is very brief because the Court has already heard lots of argument -- was People versus Jackson itself, the case that counsel has cited, in a footnote indicated, Footnote No. 14, "Consequently, admissions or findings that a burglary was of a residence established on the record of conviction can be used in later proceedings to prove that the defendant has been previously convicted of such a serious felony."

And, you know, in the minute order dated March 28, 1983, the Court fixed the degree of offense as first degree. I would take that to be a finding by the Court that it was first degree, and it was based on the factual basis and the preliminary hearing transcript.

And with that, I would submit it. [481]

MR. CRUZ: As counsel has stated, one, we don't have a preliminary hearing transcript here; two, yeah, it was of a second degree in Jackson, a second degree residential burglary.

So the question came down: Is the word "residential" by itself talismanic? And the Court says, no, it's not. There has to be a showing of inhabitation because the offense is against an inhabited dwelling. So it was resolved and eventually coming down and showing there has to be specific allegations to that effect. There has

to be a factual record made to that effect.

I point out to the Court the two cases of Tigner and also of Witt in which there were statements made by other than the defendant. What are the weights of those statements? And the Court saw in Witt it was considered error for the Court to in fact take counsel's statement as in fact equating with a factual issue.

In Tigner they were even more adamant about the fact that that should not and could not be done and should never be done by counsel because the statute requires that it be done and a clear and open record. The clear and open record that we have is a change of plea. And the defendant was asked what is it that you in fact are admitting? What he admitted was that he had burglarized these places, but there's no allegation of nighttime or residence.

THE COURT: Thank you, Mr. Cruz. That argument doesn't change my initial ruling.

[482] Is there any other legal cause why judgment should not now be pronounced?

MR. CRUZ: No, your Honor. I don't have anything else to argue.

THE COURT: The Court makes no fi::dings under rule 413, 414, 421, or 423.

A motor vehicle was not involved in the commission of this offense.

The defendant does not have the present ability to pay for fees for appointed counsel.

The defendant does not have the

present ability to pay for presentencing investigation fees. I will strike the 504 dollar requirement.

Counsel, I have read and considered the supplemental report dated April 24, 1996.

Have you both received copies of that?

MR. CRUZ: I have, you Honor. As I stated before, it's in error, and so I object to both the original and supplemental.

THE COURT: And it's in error? Do you have anything in addition to what you said yesterday?

MR. CRUZ: Well, and what I said today.

THE COURT: And what you said today?

MR. CRUZ: No, your Honor.

THE COURT: All right. I also find that the defendant does not have the ability to pay for fees for the arresting agency. I will strike the requirement for the defendant to pay the 152 dollars.

[483] The defendant, Leandro Andrade, is ordered to pay a restitution fine pursuant to Penal Code Section 1204.4 in the amount of 200 dollars to be collected by the Department of Corrections for the offense of petty theft with a prior, a felony, two counts.

The defendant, Leandro Andrade, is ordered to pay a restitution fine pursuant to Penal Code Section 1202.45 in the amount of 200 dollars. That amount is suspended

pending successful completion of parole at which time the fine will be permanently stayed. This fine is to be immediately imposed upon any revocation of parole.

The defendant, Leandro Andrade, is sentenced to the California State Prison as follows: Probation is denied. Count 1, petty theft with a prior in violation of section 666 of the Penal Code with a special enhancement of 667(b) through (i) of the Penal Code which was found true, the defendant is sentenced to the indeterminate sentence of life in prison of which he must serve 25 years, credit for time served in the amount of 109 actual days, 54 conduct days, for a total of 163 days, which may be followed by parole for a period of five to seven years.

Count 2, the defendant is sentenced to the California State Prison for the offense of petty theft with a prior in violation of Section 667 of the Penal Code with a special enhancement of 667(b) through (i) of the Penal Code found true, and the defendant is sentenced in Count 2 for the indeterminate sentence of life in prison of which he must serve 25 years, that sentence to be consecutive to [484] Count 1, for a total of life in prison, of which he must serve 50 years, credit for Count 2, a matter of four actual days, two conduct days, for a total of six days.

This may be followed by a period of parole of from five to seven years.

This sentence is pursuant to Penal Code Section 667(e)(2).

Mr. Andrade, you have an absolute right to appeal from the judgment just rendered against you and the sentence just rendered against you.

In that regard you must file with the Clerk of this Court, not the Court of Appeal, a written notice of appeal within 60 days from today's date.

You must state whether you are appealing the entire judgment or a portion thereof.

You have the right to have any attorney represent you at all stages of the appeal process. If you are indigent, the Court will appoint an attorney to represent you free of charge.

In that regard you must keep the Court informed of your present location of your present location or address at all times.

You have the right to have a complete transcript of the proceedings for purposes of review. This transcript will be provided free of charge if you are indigent.

Do you understand your appellate rights as I have explained them to you?

THE DEFENDANT: Yes, ma'am. [485]

THE COURT: Thank you.

MR. CRUZ: Your Honor, may I ask the Court two things?

THE COURT: Yes.

MR. CRUZ: One, I would ask the Court to in fact, if it's

going to do the sentencing that it just stated, make Count 2 concurrent.

I would also invite the Court to in fact state its findings as to the priors on the record since we will file an appeal, and I think it will be instrumental for the Court of Appeal to in fact have something to look on.

THE COURT: I am going to deny your request to have the sentence served concurrently because it's my understanding it's consecutive required.

Also I have already given you findings under Penal Code Section 1192.7. I made that ruling during the trial. So I don't think any further findings at this time are required, and I have made my ruling on your request.

MR. CRUZ: All right, your Honor.

THE COURT: Thank you.

MS. RUSZKOWSKI: Thank you, your Honor.

(Adjourned.)

Supreme Court, U.S.
FILED
JUN 13 2002
CLERK

No. 01-1127

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioner-Appellee,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether California's three-strikes law, providing for a twenty-five year-to-life prison term for a third strike conviction, violates the Eighth Amendment's prohibition against cruel and unusual punishment when applied to a defendant whose third strike conviction is for petty theft with a prior theft-related conviction?

2. Whether, in light of this Court's existing jurisprudence concerning the Eighth Amendment and proportionality in noncapital cases, the judgment of the California Court of Appeal, holding Andrade's consecutive twenty-five years to life sentences for convictions on two counts of petty theft with a prior, involved an unreasonable application of clearly established federal law as determined by this Court within the meaning of 28 U.S.C. § 2254(d)(1)?

3. Whether the Ninth Circuit or the Fourth Circuit is correct, concerning the necessity for a habeas court analyzing a claim under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, to first decide if the state court's determination was erroneous before deciding whether the determination was contrary to, or involved an unreasonable application of, clearly established federal law as determined by this Court?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01-1127

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioner-Appellee*,

v.

LEANDRO ANDRADE, *Respondent-Appellant*.

OPINION OR JUDGMENT BELOW

A copy of the unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division Two, appears as Appendix E to the petition for writ of certiorari at pages 68-80.

A copy of the unpublished order of the California Supreme Court, denying respondent's petition for review on direct appeal, appears as Appendix F to the petition for writ of certiorari at page 81.

The opinion of the United States Court of Appeals for the Ninth Circuit, reversing the judgment of the United States District Court for the Central District of California, Western Division, is reported in *Andrade v. Attorney General of the State of California*, 270 F.3d 743 (2001). A copy of the opinion appears as Appendix A to the petition for writ of certiorari at pages 2-53.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) to review a judgment of the United States Court of Appeals. The opinion of the United States Court of Appeals for the Ninth Circuit was filed on November 2, 2001. The petition for writ of certiorari was granted April 1, 2002.

CONSTITUTION, STATUTES, OR REGULATIONS

United States Constitution, VIII Amendment.

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 28 U.S.C. § 2254 et seq

STATEMENT OF THE CASE

On November 4, 1995, Andrade and a female entered a K-Mart store in Ontario, California, and proceeded to the electronics department. Andrade looked around, selected some videotapes and stuffed them inside his trousers. Andrade looked around again, grabbed some more tapes, and stuffed them inside his trousers. After exiting the store without paying for the merchandise, Andrade was stopped and detained by store security personnel. The combined value of the videotapes was $84.70. Pet. for Cert App. at 11.

Two weeks later, on November 18, 1995, Andrade and two females entered a K-Mart store in Montclair, California, and proceeded to the electronics department. Andrade selected a videotape and put it down the waist of his pants. Andrade selected two more tapes and went behind a partition. After exiting the store without paying for the merchandise, Andrade was stopped and detained by store

security personnel. The combined value of the videotapes was $68.84. Pet. for Cert. App. at 11.

Following a jury trial, Andrade was convicted of two counts of petty theft with a prior conviction (Cal. Pen. Code §§ 484(a), 486, 666), and the jury found true additional allegations that Andrade had sustained three prior serious or violent felony convictions within the meaning of California's three-strikes law (Cal. Pen. Code § 667(b) through (i)).[1] Joint App. at 16-20. Thereafter, the Superior Court of the State of California in and for the County of San Bernardino sentenced Andrade to two consecutive indeterminate terms of twenty-five years to life in state prison. Joint App. at 65-69.

Subsequently, the California Court of Appeal, Fourth Appellate District, Division Two, affirmed the judgment, finding the sentence did not violate the Eighth Amendment's prohibition of cruel and unusual punishment. App. to Cert. at 68, 76-79. The California Supreme Court denied further review. App. to Cert. at 81.

Based on an application made pursuant to 28 U.S.C. § 2254, the United States District Court for the Central District of California denied relief, finding the California Court of Appeal's determination of the Eighth Amendment claim was neither contrary to, nor did it involve an unreasonable application of, clearly established Supreme Court precedent. App. to Cert. at 54-64. The United States Court of Appeals for the Ninth Circuit reversed the judgment of the district court and remanded the matter with instructions. App. to Cert. at 43-44.

SUMMARY OF ARGUMENT

In *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), this Court held the Eighth

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1. Unless otherwise indicated, all further statutory references will be to California codes.

Amendment contains a narrow proportionality principle, and articulated four guiding principles for determining the uses and limitations of proportionality review. Application of those principles to the instant matter reveals the sentence under review here is not one of the exceedingly rare examples of cruel and unusual punishment proscribed by the Eighth Amendment.

Moreover, Congress enacted a habeas corpus reform act which precludes federal courts from granting relief to persons in custody pursuant to a state court judgment on any claim adjudicated on the merits in state court proceedings unless, in relevant part, the state court adjudication resulted in a decision that involved an unreasonable application of clearly established federal law as determined by this Court. The state court determination here did not unreasonably apply this Court's clearly established precedent, because the law concerning proportionality review of non-capital cases is unclear.

Finally, federal courts should be limited to reviewing the decision, as opposed to the reasoning, of the state court. Moreover, a clear error standard should not be the basis for determining the reasonableness of a state court's determination.

ARGUMENT

I.

ANDRADE'S SENTENCE IS NOT CRUEL AND UNUSUAL PUNISHMENT

A. Background

In 1994, California enacted a pair of substantively identical statutes creating California's Three-Strikes law (three-strikes). One, California Penal Code § 667(b) through (i), was enacted by the legislature. *In re Cervera* 24 Cal.4th 1073, 1075, 103 Cal. Rptr.2d 762, 16 P.3d 176, citing Stats. 1994, ch. 12, § 1, pp. 71-75. The other, Penal Code § 1170.12, was enacted by ballot initiative. *Cervera*, 24 Cal.4th at 1075, citing Prop. 184, as approved by the voters, Gen. Elec. (Nov. 8, 1994). Notwithstanding any other law or provision of law, three-strikes applies when a defendant is convicted of any felony and has previously been convicted of one or more "strikes." "Strikes" are serious or violent felonies as defined in California Penal Code sections 1192.7(c) and 667.5(c), respectively. The purpose of three-strikes is to impose longer prison terms and greater punishment on persons who commit felonies and have been previously convicted of serious and/or violent felonies. Pen. Code, § 667(b). Residential burglary is one of the enumerated serious felonies. Penal Code, § 1192.7(c)(18).

Penal Code § 667(e)(2)(A) provides that when a defendant is convicted of a triggering felony and has two or more strikes that have been pled and proved, three-strikes mandates an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence as the greater of: (i) three times the term otherwise provided as punishment for each current felony conviction; (ii) 25 years; or (iii) the term for the underlying conviction including any applicable

enhancement. A defendant sentenced to an indeterminate sentence under three-strikes is ineligible for parole until he has served his entire mandatory minimum term. *Cervera*, 24 Cal.4th at 1075. When there is more than one current conviction not committed on the same occasion, and not arising from the same set of operative facts, three-strikes mandates consecutive sentences. Pen. Code, § 667(c)(6). Sentencing courts have discretion to dismiss the strikes in the interest of justice in their entirety (*People v. Superior Court (Romero)*, 13 Cal.4th 497, 53 Cal. Rptr. 789 (1996)), or on a count by count basis. *People v. Garcia*, 20 Cal.4th 490, 85 Cal. Rptr.2d 280 (1999).

Although a recidivist's criminal record must include strikes in order to come within the scope of three-strikes, the triggering offense may be any felony under California law, including so-called "wobblers." A wobbler is an offense that can be either a misdemeanor or a felony, depending on whether it is punished by imprisonment in either the county jail or in state prison. "In the case of wobblers, the characterization of the crime is dependent upon the actual punishment imposed." *People v. Terry*, 47 Cal.App.4th 329, 332; 54 Cal. Rptr.2d 769 (1996). Petty theft with a prior theft-related conviction and imprisonment or custody on that prior (petty theft with a prior), is a wobbler. Pen. Code, §§ 484/488/666. In March of 1996, Andrade was convicted in state court of two counts of petty theft with a prior and a jury found true allegations that he had previously been convicted of three residential burglaries. In April of 1996, pursuant to Penal Code §§ 667(c)(6) and 667(e)(2)(A)(ii), the Superior Court of the State of California for the County of San Bernardino sentenced Andrade to two 25-years-to-life terms, to be served consecutively. The California Court of Appeal affirmed Andrade's sentence, rejecting his claim that the sentence was cruel and unusual punishment as proscribed by the Eighth Amendment. The California Supreme Court summarily denied Andrade's petition for review of the court of appeal's opinion.

The United States District Court for the Central District of California denied Andrade's petition for writ of habeas corpus which claimed, inter alia, his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment, finding the state court's conclusions reasonable applications of federal law. Relying on *Solem v. Helm*, 463 U.S. 277, 103 S. CT. 3001, 77 L. Ed. 2d 637 (1983) and *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), the United States Court of Appeals for the Ninth Circuit reversed the district court's decision, holding California's three-strikes law as applied in this case was unconstitutional because the sentence imposed was grossly disproportionate to Andrade's crimes, and the state court merits determination constituted an unreasonable application of clearly established Supreme Court law. *Andrade v. Attorney General of the State of California*, 270 F.3d 743, 766-767.

B. Recent Eighth Amendment Jurisprudence In Non-capital Cases

In *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), this Court questioned whether the Eighth Amendment includes a proportionality guarantee in non-capital cases. This Court distinguished between punishments which by their nature differ from other forms of accepted punishment, and "punishments which differ from others only in duration." *Hutto v. Davis*, 454 U.S. 370, 373, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982), citing *Rummel*, 445 U.S. at 275. This Court said its Eighth Amendment judgments should neither be nor appear to be merely the subjective opinions of individual justices, and the "excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make `any constitutional distinction between one term of years and a shorter or longer term of years'" *Hutto*, 454 U.S. at 373, quoting *Rummel*, 445 U.S. at 275. This Court

concluded that it could be argued without fear of contradiction by any decision of this Court that, for felonies, the length of the sentence was purely a matter of legislative prerogative. Thus, this Court upheld a life sentence for a defendant who obtained $120.75 by false pretenses, and whose only prior convictions were for fraudulent use of a credit card to obtain $80.00 worth of goods and passing a forged check in the amount of $28.36. *Rummel*, 445 U.S. at 271-72, 274. Noting that outside the context of capital punishment successful challenges to the proportionality of a sentence have been exceedingly rare, this Court further explained that the state has a legitimate interest in "dealing with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Id.* at 271-72, 285. This Court said the strength of this interest is not necessarily affected by the presence or absence of violence during the commission of the offense, and a state is therefore entitled to separate a recidivist offender from society for a longer period of time than a first-time offender. *Id.* at 275, 284-285.

In *Solem*, the defendant had been sentenced pursuant to a state recidivist statute to life imprisonment without the possibility of parole for writing a no-account check for $100. *Solem*, 463 U.S. at 281-82. The defendant had previously sustained six nonviolent convictions, "none [of which] was a crime against a person". *Id.* at 279-80. Those convictions included third-degree burglary, grand larceny, obtaining money under false pretenses, and driving while intoxicated. *Id.*. In a five-to-four opinion, this Court employed a three-prong "proportionality analysis" to determine whether the length of imprisonment constituted cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 292. The first prong considered the gravity of the offense relative to the harshness of the penalty, which included a consideration of any prior convictions supporting the sentence under a recidivist sentencing scheme. The second prong considered the sentences imposed on other criminals in the same jurisdiction for different

offenses. The third prong considered the sentences imposed on criminals in other jurisdictions for the same offense. *Id.* at 292-94, 296-97. Applying this analysis, this Court concluded the defendant's sentence violated the Eighth Amendment. *Id.* at 303. Significantly, while *Solem* embraced a different analysis than that applied in *Rummel*, the *Solem* court twice cited *Rummel* with approval and noted that *Rummel* is controlling in a similar factual situation. *Solem*, 463 U.S. at 296-97, 304, fn.32. Moreover, the four dissenting justices vigorously disputed the proposition that noncapital cases are subject to a proportionality guarantee, and criticized the majority for ignoring or distorting the holding in *Rummel*, decided only three years earlier. *Id.* at 304-15.

In *Harmelin v. Michigan*, 501 U.S. 957 (1991), this Court found itself irreconcilably split on the question of whether the Eighth Amendment includes a proportionality guarantee in noncapital cases. Nevertheless, this Court upheld a life sentence without the possibility of parole for possession of more than 650 grams of cocaine. In a separate opinion, two justices held there was no proportionality guarantee in non-capital cases. *Harmelin*, 501 U.S. at 965. In a concurring opinion, Justice Kennedy, joined by Justices O'Connor and Souter, harmonized this Court's holdings in *Rummel* and *Solem*, and articulated a revised test. This revised test held the Eighth Amendment does not require strict proportionality between crime and sentence, and forbids only "extreme sentences which are 'grossly disproportionate' to the crime." *Id.* at 1001 (Kennedy, J., concurring). Justice Kennedy's test is regarded as "the rule of Harmelin." *United States v. Jones*, 213 F.3d 1253, 1261 (10th Cir. 2000); *United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998).

The concurring opinion warned that successful challenges to the specific length of a sentence are "exceedingly rare" because of the "relative lack of objective standards concerning terms of imprisonment." *Harmelin*, 501 U.S. at 1001 (Kennedy, J. concurring). Finding the Eighth Amendment

includes a "narrow proportionality principle," Justice Kennedy's opinion acknowledged that the principle's "precise contours are unclear." *Id.* at 998. Despite the lack of precision, the plurality opinion identified four principles for determining the "uses and limits of proportionality review." *Id.* at 998. The first principle is that the fixing of prison terms for specific crimes is generally a legislative, rather than judicial, matter and reviewing courts should therefore grant substantial deference to that authority. *Harmelin*, 501 U.S. at 998-99. The second principle provides that the Eighth Amendment does not mandate any particular penological theory and, therefore, state legislatures have plenary power to grant "different weights at different times to the penological goals of retribution, deterrence, incapacitation and rehabilitation." *Id.* at 999. The third principle is that the very nature of the federal structure means there will inevitably be marked differences in the theory of sentencing and the lengths of sentences. Thus, the states have independent power to articulate societal norms through the criminal law; and the fact that one state has more severe punishment for a particular crime does not, by itself, render the punishment grossly disproportionate. *Id.* at 1000. The fourth principle is that proportionality review should be informed by "objective factors to the maximum extent possible." *Id., quoting Rummel*, 455 U.S. at 274-75.

C. Andrade's Sentence Is Not Cruel And Unusual Punishment

Applying this Court's relevant Eighth Amendment jurisprudence, it cannot be reasonably concluded that Andrade's sentence violates the Eighth Amendment. When the guiding principles of proportionality review, as articulated in *Harmelin*, are properly applied it is clear that in light of Andrade's recidivist status, having previously been convicted of three serious felonies, an aggregate indeterminate sentence of fifty

years to life in state prison is not one of the "exceedingly rare" terms of imprisonment prohibited as cruel and unusual punishment by the Eighth Amendment. *Harmelin*, 501 U.S. at 1001, quoting *Solem*, 463 U.S. at 289-290.

In *Solem*, this Court compared the gravity of offense and harshness of penalty, and then performed a comparative analysis between the defendant's sentence and sentences imposed for other crimes in Michigan, and sentences imposed for the same crime in other jurisdictions. In *Harmelin*, the plurality opinion explained that *Solem* did not establish a rigid three-part test and is best understood as having held comparative analysis within and between jurisdictions is not always relevant to proportionality review. "[I]ntrajurisidictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 501 U.S. at 1004-1005 (Kennedy, J., concurring). "The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime." *Ibid.*

The plurality's method of analysis has been adopted by most lower federal courts, including the Ninth Circuit. *See, U.S. v. Cardoza*, 129 F.3d 6, 18 (1st Cir. 1997); *Smallwood v. Johnson*, 73 F.3d 1343, 1347 (5th Cir. 1996); *U.S. v. Bland*, 961 F.2d 123, 129 (9th Cir. 1992); *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir.1999), cert. denied 531 U.S. 830, 121 S. Ct. 83, 148 L.Ed2d 45 (U.S. 10/2/2000). Nevertheless, the Fourth Circuit and Seventh Circuit continue to follow the full *Solem* test, on the theory that a majority of the *Harmelin* court either declined to overrule *Solem* or explicitly approved of *Solem*. *United States v. Kratsas*, 45 F.3d 63, 67 (4th Cir. 1995); *Henry v. Page*, 223 F.3d 477, 481-482 (7th Cir. 2000).

The concept of gross proportionality is not clearly defined, however. For example, the defendant in *Rummel* attempted to show that only the state of Texas would impose a life term for a third offense of theft. This Court rejected such a

comparison, noting that a number of States imposed a mandatory life sentence upon conviction of four felonies rather than three; other States required one or more of the felonies to be "violent" to support a life sentence; and still other States left the imposition of a life sentence after three felonies within the discretion of a judge or jury. Thus, this Court noted, it was "one thing for a court to compare those States that impose capital punishment for a specific offense with those States that do not. [citation]. It is quite another thing for a court to attempt to evaluate the position of any particular recidivist scheme within Rummel's complex matrix." *Rummel*, 445 U.S. at 280. Also noteworthy was this Court's recognition that Texas held out the possibility of parole, however slim. *See, id.*, at 281. The same is true in California.

In the present case, a threshold comparison of the gravity of Andrade's offense to the harshness of the penalty does not lead to an inference of gross disproportionality under any reasonable meaning of the term. Although Andrade's offenses were, in the abstract, relatively non-serious when compared with crimes such as murder and rape, realistically they were far more serious than the characterization the court below gave them. Minimizing the severity of the offenses by relying on the absence of violence, or by persistently referring to them as petty theft, or by relying on the small value of the property taken, and by calling the core offenses misdemeanor rather than felonies (*Andrade*, 279 F.3d at 759-61), while giving precious little regard to the recidivism involved, provides no useful comparison when evaluating the severity of the offenses.[2]

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2. This Court's Eighth Amendment jurisprudence provides that deference is owed to a state legislature's determination fixing prison terms for specific crimes. *Harmelin*, 501 U.S. at 998-999. Respondent can find nothing in this Court's jurisprudence which justifies a lesser deference

As this Court has observed, "the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." *Rummel*, 445 U.S. at 275. Moreover, any suggestion that the conduct is misdemeanor in nature fails to follow the revised *Solem* test as articulated in *Harmelin*, and misses the point. Focusing on how a recidivist's crimes would have been viewed had they been first offenses is disingenuous. In California, Andrade's crimes were not misdemeanors. The People of the State of California, by their duly elected representatives, have determined that the theft of property of any value is classifiable as a felony if the defendant had a prior theft-related offense and was placed in custody as a result of that offense. That determination is no different than the legislature's determination that the theft of property exceeding a value of $400 is a felony. California Penal Code § 487(a). Both involve line drawing that reflects the legislature's conclusions regarding society's interests. And, as *Harmelin* implicitly recognized, the California Legislature has plenary authority to make that determination.

Nor was there any unconstitutional dual use of prior convictions here. This Court has never suggested that an alleged dual use of a prior conviction implicates the Constitution. If anything, this Court has suggested the opposite. In *Witte v. United States*, 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995), for example, this Court held that, in sentencing the defendant for attempted possession of marijuana with intent to distribute, a sentencing court's consideration of an uncharged plan to ship cocaine did not constitute punishment, therefore did not violate the prohibition against multiple

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because the crime involved was a wobbler, as the Ninth Circuit seems to suggest. *Andrade*, 279 F.3d at 760, citing *Riggs v. California* 525 U.S. 1114 (1999) (respecting the denial of a petition for writ of certiorari).

punishments, and was a potential unfairness that the guidelines take into account. *Id.*, at 406. Here, similarly, any unfairness arising from the alleged dual use does not implicate the Constitution, and can be addressed via the sentencing court's discretion to dismiss strikes. In addition, in California, petty theft with a prior has been classifiable as a felony since the offense was first enacted, in 1872, and thus was in effect when three-strikes was enacted. Therefore, California's procedure is not tantamount to dual use; it merely establishes a more severe sentencing scheme for the triggering offense. Also, and dispositively in this case, the prior theft-related conviction alleged here was not one of the prior strikes, it was a March 7, 1990, petty theft conviction. Joint Appendix at 3-15.

Andrade twice stole property having previously been convicted of theft-related crimes. Accordingly, in California, he did not commit "core conduct" classified in the first instance as a misdemeanor, i.e., simple misdemeanor petty thefts. Rather, he committed offenses which were properly classifiable as felonies, a matter within the discretion of the prosecutor. And defining an act as criminal is pre-eminently the province of the legislature, and a state is entitled to make its own judgment as to where the line between a misdemeanor and a felony lies. See, *Rummel*, 445 U.S. at 275, 284.

More importantly, Andrade's recidivism demonstrates his triggering offenses are far more serious than recognized. Although the weight to be assigned to prior convictions in evaluating the constitutionality of a recidivist sentence is unclear, this Court's Eighth Amendment jurisprudence recognizes that prior convictions are relevant to a sentencing decision. *Compare, Solem*, 463 U.S. at 296, n. 21, *with Riggs*, 525 U.S. at 1114 (opinion denying writ of certiorari). Therefore, regardless of how much weight to assign Andrade's prior offenses, they cannot be divorced from his triggering offenses. It is precisely that recidivism which created the particular circumstances Andrade finds himself in today. In other words, it is not so much the triggering offenses themselves

that establish the seriousness of the offenses, it is Andrade's demonstrable refusal to remain law-abiding, despite the fact that he has been "graphically informed of the consequences of lawlessness and given an opportunity to reform. . ." *Rummel*, 445 U.S. at 278. Recidivists choose to reoffend, and therefore are amenable to deterrence through the criminal law. *Kansas v. Crane*, 122 S. Ct. 867, 874 (2002). Thus, the jurisprudence of this Court has held it is proper to punish a recidivist more severely than first-time offenders. *See, Spencer v. State of Texas*, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967).

Nor does the absence of violence in the prior offenses mean the instant offenses were so lacking in gravity that they are inferentially disproportionate to Andrade's punishment. As previously discussed, the absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." *Rummel*, 445 U.S. at 275. Besides, although nothing in the record indicates Andrade engaged in violence when he committed a series of residential burglaries, the potential for violence was great. *People v. Gauze*, 15 Cal.3d 709, 715, 125 Cal. Rptr. 773 (1975) (burglary laws principally based on recognition of danger to personal safety created by the usual burglary scenario); *see, Solem*, 463 U.S. at 304 (Burger, C.J., dissenting) (characterizing burglaries as innocuous constitutes a fiction); *id.*, at 315-16 (burglary poses a real risk of serious harm to others).

In addition, neither the lack of discretion to impose concurrent rather than consecutive terms, or the lack of good conduct or work credits, rendered the sentence substantially more severe than the life sentence involved in *Rummel*.[3] The Eighth Amendment does not mandate any one penological

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3. Contrary to the Ninth Circuit's characterization, Andrade was not sentenced to a single 50-years to life term; he was sentenced to two 25-years to life terms to be served consecutively.

theory. The states "have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring); Owens, *California's "Three Strikes" Debacle: A Volatile Mixture Of Fear, Vengeance, And Demagoguery Will Unravel The Criminal Justice System And Bring California To Its Knees* (1995) 25 Sw. U. L. Rev. 129, 132-36 (discussion on the evolution from compensatory sentencing and retribution, to reformation, to counter-reformation). Here, in enacting the three-strikes law, California has expressly accorded maximum weight to the goals of retribution, deterrence, and the incapacitation of certain repeat offenders. Pen. Code, § 667(c); *People v. Cooper*, 43 Cal.App.4th 815, 824, 51 Cal. Rptr.2d 106 (1996).

Moreover, in order to distinguish *Rummel*, *Solem* relied on the fact that South Dakota had abandoned rehabilitation as a penological goal whereas Texas had not. But the fact that California has de-emphasized rehabilitation for the time-being is of minimal import. Even scholarly reviews critical of three-strikes acknowledge rehabilitation as an indeterminate sentencing goal has failed. *See, California's "Three-Strikes" Debacle*, 25 Sw. U. L. Rev. at 135. Thus, any suggestion that a state must retain the prospect of rehabilitation as a penological goal or else risk being deemed to have violated the Eighth Amendment constitutes a substitution of the judiciary's judgment for the legislature's.

Further, three-strikes does not abandon rehabilitation completely. The law provides for parole after a minimum term is served and, as previously discussed, the California Supreme Court has construed the law as establishing a safety valve so that strikes can be dismissed in the interests of justice. *People v. Superior Court (Romero)*, 13 Cal.4th 497; *People v. Garcia*, 20 Cal.4th 490.

In any event, over time the attitude of the citizens of California may well change. In the meantime, however, deference should be at its apex, and "'[n]o neutral principle of

adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed.'" *Solem*, 463 U.S. at 314, quoting *Rummel*, 445 U.S.263 (Burger, C.J., dissenting).

The primacy of the legislature in fixing prison terms for crimes must be given substantial deference. The People of the State of California, by their duly elected Legislature and by ballot initiative, have determined that a person who commits a serious or violent felony on two or more occasions and who subsequently commits another felony offense, albeit not a serious or violent one, poses a significant danger to society such that he or she must be imprisoned for no less than twenty-five years to life. Such a determination clearly comports with the second *Harmelin* principle.

Moreover, California's approach is rational. According to Bill Jones, California's Secretary of State who, as a member of the State Assembly authored the three-strikes law, a large percentage of crime is committed by a relatively small number of repeat offenders; six percent of the criminal population commits sixty to seventy percent of all crime. Jones, "The Three-Strikes Deterrent," *The Washington Post*, April 28, 2002, at B7. Recidivist statutes are intended to deter repeat offenders and, at some point in the life of a person who repeatedly commits felonies, "segregate that person from society for an extended period of time." *Rummel*, 445 U.S. at 284. And, ". . .the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." *Id.*, at 285.

The virtue of vesting the legislative branch with this authority -- except in the most extreme cases such as the oft-mentioned, and virtually certain never to occur, hypothetical of a life sentence for a parking violation -- is clear. Our society is deeply conflicted on many issues, including the relationship between law and the social order. *See, Harmelin*, 501 U.S. at

998 (Kennedy, J., concurring). Resolving those conflicts is peculiarly a question of legislative policy. *Id.*, at 999, citing *Gore v. United States*, 357 U.S. 386, 393, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958). The judiciary's incursion into such conflicts, except in the most extreme cases about which there can be no debate, inevitably leads, as it did here, to the "substitution of individual subjective moral values for those of the legislature." *Solem*, 463 U.S. at 314 (Burger, C.J., dissenting); *see also, People v. Mantanez*, __Cal.App.4th__, 2002 Daily Journal D.A.R. 5120 (*Andrade* Court's subjective determination that life term for petty theft with a prior disproportionate overlooked the limitation on a court's role in the criminal process). In other words, except in non-debatable cases, the reviewing court's subjective opinion as to what is appropriate, on an abstract moral scale, replaces the subjective views of society as expressed through the public debate inherent in the legislative process.[4/] And, it is a "curious business" for a

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4. In fact, the legislative process did respond to concerns regarding the three-strikes issue under consideration in this case. In the wake of the notoriety surrounding this case and a few others, two bills were introduced in the California Legislature, attempting to amend three-strikes. One, AB 1790, sought to remove the mandatory minimum sentencing requirements if the triggering offense is a non-violent felony. The other, SB 1517, sought to exempt some "non-serious" felonies from three-strikes. AB 1790 is currently being held under submission in the Assembly Appropriations Committee. On May 29, 2002, the California Senate rejected SB 1517. In voting against the bill, Senator Ray Haynes, a Republican from Riverside, said an individual convicted of two violent felonies should not commit a third felony, violent or not. "If you commit a third felony, you are completely uninformed . . . and you are demonstrating to the rest of society that you don't want to live among us." "Three strikes revision rejected," *The*

court to "so far intrude into the administration of criminal justice to say that a state legislature is barred by the Constitution from identifying its habitual criminals and removing them from the street." *Solem*, 463 U.S. at 317 (Burger, C.J., dissenting).

The fourth *Harmelin* principle, that any harshness of penalty analysis must be informed by objective factors to the maximum extent possible, also indicates there is no inference of disproportionality here. Contrary to the Ninth Circuit's approach, the fact that Andrade was thirty-seven years old at the time of his sentencing and the life expectancy of a thirty-seven-year-old American male is seventy-seven years, provides no objective basis for analysis. Such reasoning manifests the very problem this Court tried to address by mandating the use of objective factors in the first place, i.e., it results in an unworkable system. For example, would the sentence imposed on Andrade be constitutional if he had been twenty years old at the time of sentencing? Would it be constitutional if it resulted in two consecutive twenty-year sentences with parole eligibility after a minimum of forty years, i.e., when Andrade was still within his life expectancy? What if the National Center for Health Statistics revises its estimate of the life expectancy of a 37-year-old American male? Surely, the various health profiles of defendants will affect their life expectancies. Therefore, to what extent is a defendant's individual health status at the time of sentencing a factor in the constitutionality of a sentence?

Moreover, Andrade's sentence is a "term of years," which is markedly different than the "life without parole" sentences considered in *Solem* and *Harmelin*. And even though Andrade will not be eligible for parole for 50 years, his sentence is not the functional equivalent of life without parole. His sentence still offers the possibility of parole, albeit minimal. Besides, Andrade's ineligibility for parole for 50 years is a function of three-strikes' mandate for consecutive sentencing,

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Sacramento Bee, May 30, 2002.

not the fundamental question of whether a 25-years-to-life sentence is disproportionate for each of Andrade's recidivist acts.

More importantly, as this Court has previously recognized, proportionality review of the harshness of a penalty is virtually impossible for a "term of years" sentence, because there are no objective standards for distinguishing between sentences of different lengths. *See, Solem*, 463 U.S. at 306 (Burger, C.J., dissenting) (in the absence of objective standards, reviewing courts are asked to "determine on an abstract moral scale" if the defendant has received his just desserts for his crimes). In fact, what happened here, i.e., a reliance on purely subjective factors, illustrates the problem. And given the infinite permutations of subjective factors, unless a sentence was beyond debate among reasonable minds, endorsing proportionality review for terms of years sentences would virtually require particularized sentencing for every defendant; something this Court has never required in non-capital cases. As Chief Justice Burger's dissent in *Solem* suggested, it is a question of whether a bright line can be drawn or not. A bright line can be drawn between death and various other punishments short of that sanction. Similarly, *Solem* could draw a bright line between life without the possibility of parole and the term of years in *Rummel*. No bright line can be drawn between various terms of years, however.

Even assuming a threshold comparison of the gravity of the offense and the harshness of penalty led to an inference of gross disproportionality here, intrajurisdictional and interjurisdictional comparisons would not validate the initial conclusion. On an intrajurisdictional basis, the finding that Andrade's fifty years-to-life sentence was exceeded in California only by sentences imposed for first-degree murder and a few other violent crimes, and longer than sentences imposed for certain other third-strike offenders, is flawed and incomplete. Andrade's two consecutive twenty-five year sentences cannot be fairly compared to other three-strike

defendants who committed only one offense. Andrade's sentence is twice as long as other three-strikes defendants because he committed twice as many offenses. Moreover, it is wrong to compare stacked offenses as a single punishment, because it enables defendants to generate a colorable Eighth Amendment claim simply by reoffending. *See, Andrade*, 270 F.3d at 772 n. 4 (Sneed, J. dissenting).

A recidivist's sentence cannot be compared with the sentences non-recidivist first-time offenders receive, either. California has enacted a recidivist sentencing statute carefully tailored to address those defendants that pose the greatest danger and create the most significant burden to society. Jones, "The Three-Strikes Deterrent," *The Washington Post*, April 28, 2002, at B7. It is the significant burden Andrade places on society by virtue of his chronic criminal activity that is under consideration. Therefore, a more appropriate comparison would be between Andrade's sentence and the sentences received by more serious recidivists in California; a comparison that favors the state. Sentences meted out under the three-strikes law become significantly longer for progressively more serious offenses.

For example, pursuant to Penal Code § 667(a), a recidivist who commits a serious felony will receive, in addition to the basic 25 to life, an additional consecutive five-year enhancement for each serious prior pled and proved. Another example is Penal Code § 12022.53, which provides for an additional ten years if the defendant used a firearm during the commission of the current crime, twenty years if the defendant fired the gun, and 25 years to life if the defendant fired the firearm and caused great bodily injury or death. Thus, a person who committed the most heinous of crimes, i.e., a first-degree murderer, who also had two strikes, would receive, at a minimum, 75 years to life plus additional punishment for prior serious felonies. Accordingly, when a proper comparison is made, it is apparent that defendants with more serious or violent triggering offenses are punished more harshly than Andrade.

The interjurisdictional analysis, which found Andrade's sentence cruel and unusual punishment, is similarly flawed, as it fails to recognize *Harmelin's* third principle, that significant differences in the length of prescribed sentences are the inevitable, and often beneficial, result of our nation's federal structure. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, 445 U.S. at 282. The fact that the statute employed against Andrade_is the most stringent in the nation hardly renders Andrade's punishment grossly disproportionate and therefore unconstitutional. *See, Id.* In fact, the irony is, as the California Court of Appeal recently observed, under the Ninth Circuit's rationale federalism would only extend "to those within the extremes," and the extremes would be "automatically suspect." *Mantanez*, __Cal.App.4th__, 2002 Daily Journal D.A.R. 5120.

In addition, at least four other states have recidivist sentencing schemes that , contrary to the opinion below, are not significantly distinguishable, in a Constitutional sense, from California's as it relates to Andrade. *See, Andrade*, 270 F.3d at 762-65. And the fact that four other states' views are close to California's tends to invalidate any inference of gross disproportionality.

The rationale used by the court below also trampled on fundamental concepts of federalism in another way; it ignores the fact that California's situation is simply drastically different than that of the other states. *See, Solem*, 463 U.S. at 309 (Burger, C.J., dissenting). California is entitled to evaluate the relationship between the crime rate and recidivism, and to incapacitate habitual offenders in accordance with its construction of the results, regardless of the views of any other state. Conversely, a rigid obligation to engage in interjurisdictional comparisons allows the sentencing approach of an individual state to be dictated by other states whose views might differ, gradually ratcheting down punishments to a de

facto uniform national sentencing scheme. Thus, a proper respect to a state's independent power to articulate societal norms through its criminal law demands substantial consideration of *Harmelin's* third factor.

Stated another way, the citizens of the State of California are entitled to conclude that a person such as Andrade, who has demonstrated a willingness to commit serious or violent felonies on more than one occasion, who has been imprisoned for that conduct, and who subsequently evidences a continued refusal to remain law-abiding, has manifested an imperviousness to deterrence that poses a significant danger to society, regardless of how trivial the triggering offense may be. In other words, nothing in the Constitution requires society to wait for another person to be victimized by another serious or violent crime before isolating such a defendant for a substantial period of time. See, Jones, "The Three-Strikes Deterrent," *The Washington Post*, April 28, 2002, at B7.

Finally, the uses and limits of proportionality review, as enumerated in *Harmelin*, require a reviewing court to respect a basis for a sentence if the basis is rational. *Andrade*, 270 F.3d at 769, (Sneed, J., dissenting), citing *Harmelin*, 501 U.S. at 1004. Here, there is a rational basis for Andrade's sentence. California is the most populous state, with the largest problem of crime and recidivism. Since the adoption of three-strikes, California has experienced a forty-one percent drop in its crime rate, whereas the rest of the nation experienced a nineteen percent drop. See, Jones, "The Three-Strikes Deterrent," *The Washington Post*, April 28, 2002, at B7. In *Harmelin*, the plurality concluded the pernicious effects of the drug epidemic demonstrated the Michigan Legislature could rationally conclude the threat posed by the possession of 1.5 pounds of cocaine was momentous enough to warrant the deterrence and retribution of a life without the possibility of parole sentence. Here, similarly, the California Legislature could rationally conclude that the pernicious effects of a defendant's continued failure to remain law-abiding, combined with a demonstrated

willingness to commit serious felonies, is momentous enough to warrant the deterrence, retribution, and segregation resulting from a life sentence. The fact that Andrade received two life sentences, back to back, is more an indication of his failure to respect the notice he was given, than it is an indication that three-strikes as applied to him violates the Eighth Amendment.

Moreover, unlike the sentencing scheme considered in *Solem*, California's scheme incorporates a discretionary feature, supporting the conclusion that the scheme is constitutional. A putatively disproportionate three-strikes sentence is subject to judicial modification if the sentencing court deems it appropriate. *Mantanez*, __Cal.App.4th__, 2002 Daily Journal D.A.R. 5120, citing *Romero*, 13 Cal.4th 497. "This safety valve suffices for constitutional purposes; no greater and more informed wisdom concerning an offender's culpability is, as a matter of course, available to a reviewing court." *Ibid.*

Although Andrade's sentence is severe, the fact that it does not involve life without the possibility of parole distinguishes it from *Solem*. Moreover, it is not grossly disparate given Andrade's record. Numerous decisions of this Court have held it is proper to punish a recidivist more severely than first-time offenders (see, *Spencer*, 385 U.S. 554), and all that is being considered here is where to draw the line. Andrade's criminal history establishes he is a serious offender. In the seventeen years preceding the instant convictions, he has one misdemeanor theft conviction for which he served six days in jail and received twelve months probation, three residential burglary convictions in state court, two transportation of marijuana convictions in federal court, one petty theft conviction in state court, and seven residential burglary charges were dismissed pursuant to a plea bargain. In addition, he violated federal parole by escaping from custody. Andrade's sentence simply reflects California's substantive penological judgment regarding how long chronic criminals such as Andrade need to be isolated from society. "And the

responsibility for making these fundamental choices and implementing them lies with the legislature." *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring).

In summation, similar to the approach taken in *Teague v. Lane*, 389 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), for determining whether a rule is dictated by precedent, petitioner maintains that "exceedingly rare" instances of unconstitutional sentences ought to be limited to sentences which are not susceptible to debate among reasonable minds. Short of that virtually complete consensus, a determination as to the appropriate punishment for recidivism is best left to the legislature. Andrade's sentence is subject to debate among reasonable minds. Moreover, given the burden a felony recidivist places on society, a life sentence is categorically not grossly disproportionate. Therefore, Andrade's sentence is constitutional.

II.

THE STATE COURT'S MERITS DETERMINATION DID NOT INVOLVE AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT

In the course of resolving Andrade's direct appeal, the California Court of Appeal held Andrade's sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Pet. for Cert. App. at 76-79. In 1998, long after enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (AEDPA), Andrade filed an application pursuant to 28 U.S.C. § 2254. The district court denied the application finding the state-court decision was neither contrary to, nor did it involve an unreasonable application of, clearly established federal law as determined by this Court. Relying on a rule first articulated in *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000) cert. denied 531 U.S. 944, 121 S. Ct. 340, 148 L. Ed. 2d 274 (2000) (the occurrence of clear error constitutes an unreasonable application of clearly established Supreme Court law within the meaning of § 2254), the Ninth Circuit reversed the judgement of the district court, finding the state court clearly erred. *Andrade*, 270 F.3d at 747, 766-67.

AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas "retrials" and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, ___U.S.___, 2002 WL 1050365, citing *Williams v. Taylor*, 529 U.S. 362, 403-404, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). To those ends, 28 U.S.C. § 2254(d)(1) provides that an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be

granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court. *Bell v. Cone*, ___U.S.___, 2002 WL 1050365.

"Federal law as determined by this Court" refers to "the holdings, as opposed to the dicta of [the Court's] decisions as of the time of the relevant state court decision." *Williams*, 529 U.S. at 412. The federal court independently determines whether a rule is "clearly established" for this purpose. *Id.* at 382. To make this determination, the federal court employs the same analysis used to determine whether a rule is "old" under the doctrine of *Teague*, 389 U.S. 288, except that the court looks only to this court's jurisprudence. *Id.* at 380-84, 412, 416. For § 2254(d)(1) purposes, a rule is "clearly established" if it is "'dictated by precedent at the time the defendant's conviction became final.'" *Williams*, 529 U.S. at 381, *quoting Teague*, 389 U.S. at 301. A rule is not dictated by precedent if a survey of the existing legal landscape shows reasonable jurists may differ about the outcome. *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990); *see also, Butler v. McKellar*, 494 U.S. 407, 415, 110 S. Ct. 1212, 108 L. Ed. 2d 307 (1990) [stating *Teague* test as whether a rule is "susceptible to debate among reasonable minds"].

The focus of an "unreasonable application" inquiry "is on whether the state court's application of clearly established federal law is objectively unreasonable." *Bell v. Cone*, ___U.S.___, 2002 WL 1050365, citing *Williams*, 529 U.S. at 403-404. As this Court stressed in *Williams*, "an unreasonable application is different from an incorrect one." *Id.*, citing *Williams*, 529 U.S. at 409- 410, 411.

Contrary to the determination below, the California Court of Appeal's adjudication did not involve an unreasonable application of clearly established federal law as determined by this Court, for three reasons. First, in *Van Tran*, 212 F.3d 1143,

the Ninth Circuit held the occurrence of clear error constitutes an unreasonable application of clearly established Supreme Court law within the meaning of § 2254. *Id.*, at 1153-54. But clear error is not an appropriate standard for determining the reasonableness of a state court's merits determination within the meaning of 28 U.S.C. § 2254(d)(1).

Although the term "unreasonable" is difficult to define,[5/] in light of the fact that Congress specifically used that word and not a word such as "erroneous" or "incorrect", an unreasonable application of federal law is different from an incorrect application of federal law. *Williams,* 529 U.S. at 410-11. Therefore, a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court decision applied clearly established federal law erroneously or incorrectly; for a grant of habeas corpus relief the state court decision must also be objectively unreasonable. *Williams*, 529 U. S., at 409, 411.

Clear error, in the context of federal habeas review, is simply a euphemism for a court's independent judgment that it is certain an error has occurred. *See, Van Tran*, 212 F.3d at 1153 (clear error means a definite and firm conviction that an error has been committed). In addition, it fails to address the reasonableness of a state court determination. S*ee, Bell v. Jarvis*, 236 F.3d 149, 161-162 (4th Cir. 2000), *cert. denied sub. nom Bell v. Beck*, ___ U.S. ___, 122 S. Ct. 74, 151 L. Ed. 2d 39 (2001), citing *Francis v. Stone*, 221 F.3d 100, 110 (2d Cir. 2000) (the *Van Tran* standard focuses on how sure the federal court is that the state court erred, rather than on whether the state court decision revealed an "increment of wrongness beyond error"). Accordingly, use of a clear error standard for reviewing state court determinations conflicts with the

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5. In a literal sense, "unreasonable" means not guided by reason, irrational, or capricious. Black's Law Dictionary (7th Ed. 1999), p. 1537.

principles this Court set forth in *Williams* and *Bell v. Cone*.

Equating clear error with unreasonableness also conflicts with this Court's explanation, in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993), of the distinction between clear error and unreasonable. There, this Court said a finding is clearly erroneous when, although there is evidence to support it, the reviewing body on the entire evidence is left with the definite and firm conviction that a mistake has been committed, whereas a showing of unreasonableness would require even greater certainty of error. *Id.*, at 622.

More importantly, application of a clear error standard thwarts Congress' purpose in enacting habeas corpus reform in the first place. According to the Senate sponsor of AEDPA, § 2254(d)'s requirements are the "single most important provision contained in the habeas reform proposal" (141 Cong. Rec. 15,062, col 2 (1995)) (statement of Sen. Hatch), and "[s]tate courts, in many respects, are just as good, if not better, than the Federal courts in these areas, just as good." (Statement of Sen. Hatch). In other words, deference is the essence of AEDPA. And applying a "clear error" standard, which inherently fails to incorporate a consideration of whether there is a degree of wrongness beyond error, fundamentally precludes deference to the state court determination. In fact, application of *Van Tran's* clear error standard comes close to a judicial repeal of the statute. The degree to which a federal court is convinced on the merits is the exact standard this Court rejected in *Williams* because it would have given the 1996 amendment no effect whatsoever. *Williams*, 529 U.S. at 403.

A more appropriate standard for determining reasonableness can be found by analogy to *Teague*. Although *Williams* rejected an "all reasonable jurists" standard, it was not a wholesale rejection of *Teague*. *See, Williams*, 529 U.S. at 410. As previously discussed, under *Teague*, the standard is whether the question is susceptible to debate among reasonable

minds. That standard is clearly distinguishable from an "all reasonable jurists" standard, and easily translates to the reasonableness inquiry required by AEDPA. In fact, this Court has essentially said that *Teague* is a test of objective reasonableness. *O'Dell v. Netherland*, 521 U.S. 151, 156, 117 S. Ct. 1969, 138 L. Ed. 2d 351(1997).

Second, relying in part on the state court's reasoning, the court below held the state court's disregard of *Solem* yielded an unreasonable conclusion. *Andrade*, 270 F.3d at 766. But the intricacies of the state court's reasoning need not concern a federal habeas court. What matters is whether the decision was contrary to controlling federal law. *Hernandez v. Small*, 282 F.3d 1132, 1140 (9th Cir. 2002), citing *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) (a habeas court is determining the reasonableness of a state court's decision, not grading the state court's papers); *see, Neal v. Puckett*, 286 F.3d 230, 244-46 (5th Cir. en banc, 2001) (§ 2254(d) authorizes a federal habeas court to review only a state court's decision, and not the opinion explaining that decision). Moreover, nothing in the phrase "adjudicated on the merits" requires a state court to either explain its reasoning process or risk being held to have unreasonably applied precedent. *See, Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001).

In fact, addressing the intricacies of the state court's reasoning has led to a hyper-technical application of § 2254(d), resulting, in some cases, to virtually no deference to the state court determination whatsoever. For example, in *Visciotti v. Woodford*, 283 F.3d 1097 (9th Cir. 2002), the court held that in evaluating the prejudice prong of an ineffective assistance of counsel at the penalty phase claim, the California Supreme Court's use of the word "probable," rather than "reasonable probability," rendered the state court determination "contrary to" Supreme Court law. *Id.* at 1108-09. But when viewed in context, the state court's use of the term "probable" appears to have been just a shorthand version of "reasonable probability." *See, In re Visciotti*, 14 Cal.4th 325, 330, 355-56, 58 Cal.Rptr.2d

801(1997). Similarly, in *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002), the court held the mere "addition, deletion, or alteration of a factor in a test established by the Supreme Court" constitutes "a failure to apply controlling Supreme Court law under the "contrary to" clause of AEDPA." *Id.* at 1051, fn. 5, citing *Williams*, 529 U.S. at 405-06, and *Brown v. Mayle*, 283 F.3d 1019, at 1039 (9th Cir.2002)).

Further, conditioning reasonableness on the quality of the state court's reasoning, rather than the result, conflicts with the principles this Court established when it held state courts are presumed to follow the law even when they fail to so indicate, *Walton v. Arizona*, 497 U.S. 639, 653 (1990), and federal habeas courts should not require state courts to use particular language in every case in which a state prisoner raises a federal claim. *Coleman v. Thompson*, 501 U.S. 722, 739 (1991). Moreover, it places federal courts in precisely the sort of tutelary relation to state courts that AEDPA was designed to end. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997).

Third, contrary to the holding below, a survey of this Court's Eighth Amendment proportionality jurisprudence reveals the law governing the application of the Eighth Amendment to non-violent offenders sentenced to life in prison was not **clearly established** at the time of the State court's determination. In *Rummel*, this Court held a life sentence constitutional for a non-violent recidivist whose triggering offense was de minimus. Similarly, in *Hutto*, this Court essentially endorsed a 40-year sentence for possession of nine ounces of marijuana. On the other hand, *Solem* invalidated a life sentence for a non-violent recidivist whose triggering offense was de minimus, but in the process expressly distinguished the case from *Rummel* on the basis that *Rummel* involved a term of years whereas *Solem* involved life without parole. Moreover, *Solem* did not overrule *Rummel*, and said it was controlling in similar circumstances. *Solem*, 463 U.S. at 303, fn. 32. Further, in *Harmelin*, this Court held life without parole constitutional for a first time offender convicted of a

single offense of possession of 650 grams of cocaine. Thus, while it is true that in light of *Harmelin* it appears this Court has found proportionality a factor in capital cases and in non-capital cases involving a "life without the possibility of parole" sentence, it is anything but clear whether proportionality is a factor in cases involving terms of years sentences. This is particularly true in that *Rummel* supports an opposite conclusion. Support for this assertion is also found in Circuit Judge Sneed's concurring in part and dissenting in part opinion in the instant matter, which aptly noted that, "in the wake of *Harmelin*, not a single court has struck down the sentence of an habitual offender on Eighth Amendment grounds." *Andrade*, 270 F.3d at 770.

In other words, there is obvious uncertainty concerning the precise method of proportionality review in non-capital cases. In fact, in *Harmelin,* this Court expressly acknowledged as much. There, Justice Scalia said *Solem* " was scarcely the expression of clear and well-accepted constitutional law," *Harmelin*, 501 U.S. at 965. And Justice Kennedy said that, although they could be reconciled, this Court's "proportionality decisions have not been clear or consistent in all respects" and that, although this Court's decisions have recognized a proportionality principle, its "precise contours are unclear." *Harmelin*, 501 U.S. at 996-998. This lack of clarity was also recognized in *United States v. Kratas*, 45 F.3d 63 (4th Cir. 1995), where the court said it is unclear in light of *Harmelin* whether *Solem's* three-part proportionality test is still relevant in non-capital cases. *Id.*, at 67.

Consequently, the California Court of Appeal did not unreasonably apply this Court's precedent. The state court acknowledged *Harmelin*, concluded it rendered *Solem's* continued vitality questionable, and applied *Rummel*, the case most similar to the facts of this case. Given the striking similarities between Andrade's case and the defendant in *Rummel*, it is not unreasonable for the state court to have concluded that *Rummel* controlled, and therefore two 25-years-

to-life sentences for a chronic recidivist did not constitute cruel and unusual punishment. Accordingly, the state court's merits determination must be upheld. 28 U.S.C. § 2254(d).

III.

FEDERAL HABEAS COURTS SHOULD NOT DECIDE WHETHER A STATE COURT DETERMINATION WAS ERRONEOUS BEFORE TURNING TO THE QUESTION OF WHETHER THE STATE COURT DETERMINATION WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, THE UNITED STATES SUPREME COURT'S CLEAR PRECEDENT

In *Van Tran*, the Ninth Circuit held that, when analyzing a habeas corpus claim utilizing the standard of review prescribed at § 2254(d)(1), before deciding whether the state court determination was contrary to, or an unreasonable application of clearly, established federal law as determined by this Court, a federal court must first consider whether the state court's determination was erroneous. *Id.*, at 1154-55. According to *Van Tran*, such a methodology promotes clarity in the Ninth Circuit's own constitutional jurisprudence and provides guidance to the state courts which can look to the federal courts' decisions for their persuasive value. *Van Tran*, 212 F.3d at 1155. In support of its reasoning, the *Van Tran* Court cited, inter alia, *Weeks*, 528 U.S. at 235-37, where this Court rendered an independent decision on the merits of a petition based on this Court's precedents and then determined whether the AEDPA provisions barred relief.

In *Bell*, 236 F.3d 149, the Fourth Circuit rejected the *Van Tran* methodology. *Bell* explained that the *Van Tran* requirement seems to be predicated on a decision to equate an "unreasonable" state court decision within the meaning of § 2254(d)(1) purposes with one that is "clearly erroneous." *Bell*, 236 F.3d at 162, fn. 9. Citing this Court's *Williams* decision,

Bell held that "unreasonable" and "clearly erroneous" could not be equated. *Id.* at 162. *Bell* further noted that, in *Francis*, 221 F.3d at 110, the Second Circuit concluded the *Van Tran* requirement focuses on how sure the federal court is that the state court erred, rather than on whether the state court decision revealed an "increment of wrongness beyond error." *Bell*, 236 F.3d at 162. *Bell* thus rejected the idea that a federal court's independent opinion on the merits of any constitutional claims could have any determinative effect on a case, or any precedential value for state courts, finding such an independent opinion would constitute, at best, a body of constitutional dicta. *Id.* at 162.

Concerning *Van Tran*'s suggestion that the methodology it adopted would provide guidance to the state courts, *Bell* observed there were no persuasive reasons for federal habeas courts to offer opinions on constitutional questions in order to provide guidance to the state courts, nor was there any reason to presume state courts needed the guidance. *Bell*, 236 F. 3d. at 162. Finally, *Bell* rejected *Van Tran's* reliance on *Weeks*, concluding it could find no implied requirement that lower federal courts are to render an independent decision on the merits of a claim and noting that *Weeks* did not require such a methodology. *Id.* at 161, fn. 8.

The criticisms of the *Van Tran* methodology expressed in *Bell* and *Stone* are well-taken. A determination as to whether error occurred serves no purpose. As previously discussed, a federal habeas court's determination that the state court erred is essentially irrelevant to an analysis of whether the state court determination was reasonable or not. Moreover, the *Van Tran* methodology seems to conflict with this Court's more recent decision in *Penry v. Johnson*, 532 U.S. 782, 121 S. Ct. 1910, 150 L. Ed. 2d 9 (2001), where this Court first determined whether the state court determination was contrary to, or an unreasonable application of, this Court's established precedent. Concluding the state court's determination did not violate either prong of the statutory standard of review, this Court held the

defendant was not entitled to any relief. *Penry*, 121 S. Ct. at 1919. In so doing, this Court at least impliedly rejected the *Van Tran* methodology.

CONCLUSION

This Court should end the confusion surrounding its Eighth Amendment jurisprudence in non-capital cases. In the final analysis, the question before this Court is what will the Constitution tolerate regarding term of years sentences. The answer ought to be that "exceedingly rare examples" of unconstitutional sentences are those sentences that are not susceptible to debate among reasonable minds. Any other test is unworkable and antithetical to concepts of federalism.

This Court should clarify that federal habeas review of state court merits determinations is limited to the decision of the state court, and does not extend to the state court's reasoning.

This Court should also clarify what "unreasonable" means within the context of § 2254(d). Although what is "reasonable" inherently involves the particular circumstances of a case, the test ought to be that a state court determination is reasonable if the result is susceptible to debate among reasonable minds. Such a test provides the best method of evaluating the results of a state court determination.

Accordingly, Petitioner-Appellant respectfully requests the judgment of the Court of Appeals for the Ninth Circuit be reversed.

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In The Supreme Court of the United States

BILL LOCKYER, ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA,

Petitioner,

v.

LEANDRO ANDRADE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Is an indeterminate life sentence, with no possibility of parole for 50 years, grossly disproportionate and thus a violation of the Eighth Amendment when imposed for shoplifting $153 worth of videotapes?

2. In light of this Court's consistent holdings that grossly disproportionate punishments violate the Eighth Amendment, was the state court's decision upholding an indeterminate life sentence, with no possibility of parole for 50 years, for stealing $153 worth of videotapes "contrary to" or an "unreasonable" application of clearly established federal law?

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STATEMENT OF THE CASE

On November 4, 1995, Leandro Andrade – a nine-year army veteran and father of three – was caught shoplifting five children's videotapes (*Snow White, Casper, The Fox and the Hound, The Pebble and the Penguin, and Batman Forever*), worth a total of $84.70, from a K-Mart store in Ontario, California. The store's Loss Prevention Officer observed Andrade's actions and Andrade was stopped, the videotapes confiscated, and he was arrested for shoplifting.

On November 18, 1995, Andrade went to a different K-Mart store, in Montclair, California, and was caught shoplifting four children's videotapes (*Free Willy 2, Cinderella, Santa Claus, and Little Women*) worth $68.84. Again, Andrade was observed on store video cameras and he was stopped by security officers, the videotapes confiscated, and Andrade was arrested for shoplifting.

Under California law, these incidents generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. Cal. Penal Code §490.

California law, however, provides that petty theft with a prior conviction for a property offense is a "wobbler," a crime that can be punished, in the discretion of the prosecutor or the sentencing judge, as either a felony or a misdemeanor. Cal. Penal Code §666. Because Andrade had at least two prior convictions for property offenses, albeit for the non-violent crime of burglary, his petty theft was prosecuted as a felony, "petty theft with a prior."

On January 19, 1996, a one-count information was filed by the San Bernardino County District Attorney charging Andrade with petty theft with a prior conviction in violation of Cal. Penal Code §666. The allegation was that Andrade stole five videotapes, worth $84.70, from the K-Mart in Ontario, California. The information alleged that Andrade had three prior felony convictions arising from residential burglaries committed on April 26, 1983. On March 13, 1996, the court granted a joint motion to consolidate the case with the other prosecution for shoplifting, thereby adding a second count of petty theft with a prior. The second count was for stealing four videotapes, worth $68.84, from the K-Mart in Montclair, California.

Andrade's trial began on March 18, 1996, and on March 21, 1996, the jury found him guilty of "petty theft" on both counts of stealing videotapes. (Joint App. at 16-17). On March 27, 1996, the jury found, as required by California law, that Andrade did in fact have three prior convictions for burglary, as alleged by the prosecution. (Joint App. at 18-21).

Pursuant to the Three Strikes law, on April 24, 1996, the court sentenced Andrade to prison for 25 years to life on count 1, and 25 years to life on count 2, ordering the terms served consecutively. Cal. Penal Code Ann. §667(e)(2)(A). As required by the Three Strikes law, Andrade's sentence is an indeterminate life sentence, with no possibility of parole for 50 years. (Joint App. at 65-69).

California's "Three Strikes" law was initially adopted by the California legislature as a statute, Stats. 1994, ch. 12, §1, and then approved by the voters as an initiative. Proposition 184, §1, approved by voters, Gen. Elec. (Nov. 8, 1994). Several aspects of the law, as interpreted by the

California courts, led to Andrade being sentenced to 50 years to life for stealing $153 worth of videotapes. First, although only "serious" or "violent" felonies, as defined by Cal. Penal Code §1192.70 and §667.50 respectively, qualify as prior strikes, *any* felony, including petty theft with a prior, may serve as a third strike and be the basis for a life sentence. Prior strikes need not be violent offenses as long as they are deemed "serious," and Andrade's prior burglary convictions meet this latter requirement. Cal. Penal Code, §§1192.7(c)(18), 460(a). Under the California Three Strikes law, Andrade would have been subject to an indeterminate life sentence for any act of petty theft, even shoplifting a candy bar.

Second, Andrade was considered to have two prior strikes, even though both of his prior burglary convictions were sustained in the same proceeding. *See, e.g., People v. Askey*, 49 Cal.App.4th 381, 56 Cal.Rptr.2d 782, 785 (Ct.App. 1996). Third, it is irrelevant under the law that Andrade's prior convictions occurred in 1983, 12 years before his arrests for shoplifting. There is no "washout" period after which prior qualifying convictions will no longer be considered as strikes. *See, e.g., People v. Martinez*, 71 Cal.App.4th 1502, 84 Cal.Rptr.2d 638, 646 & n.9 (Ct.App. 1995). Fourth, defendants with prior strikes who are convicted of multiple felonies must serve consecutive sentences. Cal. Penal Code §§667(c)(6), 1170.12(a)(6). Thus, Andrade received two sentences of 25 years to life in prison, to run consecutively. Finally, each sentence is deemed to be an indeterminate life sentence, with no possibility of parole until at least 25 years have been served. *In re Cervera*, 24 Cal.4th 1073, 16 P.3d 176, 181 (Cal. 2001). Therefore, Andrade's earliest possible parole

date is 50 years after his convictions in 1996, in the year 2046. In 2046, Andrade will be 87 years old.

The California Court of Appeal affirmed the judgment, finding that the sentence did not violate the Eighth Amendment's prohibition of cruel and unusual punishment. App. to Cert. Pet. at 68, 76-79. The Court of Appeal doubted whether proportionality analysis was appropriate under the Eighth Amendment and focused its Eighth Amendment analysis exclusively on *Rummel v. Estelle*, 445 U.S. 263 (1980). Based on that decision, the court affirmed Andrade's sentence. The California Supreme Court denied review. App. to Cert. Pet. at 81.

Andrade then filed a timely habeas corpus petition in the United States District Court for the Central District of California. The district court denied the habeas petition, App. to Cert. Pet. at 54-64, and Andrade appealed. The United States Court of Appeals for the Ninth Circuit reversed the judgment of the district court and remanded the case with instructions that Andrade be resentenced or released.

SUMMARY OF ARGUMENT

1. It is cruel and unusual punishment in violation of the Eighth Amendment for Andrade to have been sentenced to 50 years to life in prison for two counts of stealing videotapes worth a total of $153.54. Under California law, thefts of this amount generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. Cal. Penal Code §490. California law, however, provides that petty theft with a prior conviction for a property offense is a

"wobbler," subject to punishment as either a misdemeanor or a felony. Cal. Penal Code §666. Thus, Andrade's misdemeanor, petty theft, was elevated to a felony because of his prior offenses. Because of these same prior offenses, Andrade's shoplifting also was treated as a "third strike," triggering consecutive sentences of 25 years to life in prison for each count of stealing videotapes.

The law is clearly established that "grossly disproportionate" punishments constitute cruel and unusual punishment in violation of the Eighth Amendment. *See, e.g., Atkins v. Virginia*, 122 S.Ct. 2242, 2246 (2002); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (seven Justices concluding that "grossly disproportionate" sentences violate the Eighth Amendment); *Solem v. Helm*, 463 U.S. 277 (1983).

In *Solem v. Helm*, this Court articulated a three-part test for determining whether sentences are grossly disproportionate. 463 U.S. at 292. First, courts are to compare "the gravity of the offense and the harshness of the penalty." Second, courts are to consider the sentences imposed on other criminals in the same jurisdiction. Finally, courts are to look to the "sentences imposed for commission of the same crime in other jurisdictions." 463 U.S. at 291. In *Harmelin v. Michigan*, Justice Kennedy's concurring opinion agreed with both *Solem*'s holding that a grossly disproportionate sentence of imprisonment violates the Eighth Amendment and its three-part test. 501 U.S. at 1001. Justice Kennedy said, though, that courts need not examine the second and third factors mentioned in *Solem* – the intra-jurisdictional and inter-jurisdictional reviews – unless a "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* at 1005.

Under the *Solem/Harmelin* analysis, a sentence of 50 years to life in prison for two counts of stealing videotapes is "grossly disproportionate." The offense was minor, but the punishment was enormous: an indeterminate life sentence with no possibility of parole for 50 years. Petty theft is deemed a misdemeanor by California and two counts of petty theft are punishable by at most one year in jail. Absent the Three Strikes law, two counts of "petty theft with a prior" are punishable by at most three years and eight months in prison. Cal. Penal Code §1170.1(a).

In California, only first degree murder and a few other violent crimes would receive a sentence greater than Andrade's punishment of an indeterminate life sentence with no possibility of parole for 50 years. *See, e.g.*, Cal. Penal Code §193 (voluntary manslaughter is punishable by up to 11 years in prison); Cal. Penal Code §264 (rape is punishable by up to eight years in prison); Cal. Penal Code §190 (second degree murder is punishable by 15 years to life in prison). In fact, if Andrade's prior crimes had been for murder or rape, the maximum sentence for his shoplifting would have been one year in jail; under California law, the crime of petty theft with a prior requires that there be a previous property crime. Cal. Penal Code §§490, 666.

In no other state could Andrade have received an indeterminate life sentence with no possibility of parole for 50 years for stealing $153 worth of videotapes. As Justice Stevens recently noted: California is the "only state in the country in which a misdemeanor could receive such a severe sentence." *Riggs v. California*, 525 U.S. 1114 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari).

This Court has recognized that states may punish recidivist conduct harshly, but it also has emphasized that there is a constitutional limit imposed by the Eighth Amendment. *See Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980); *Solem v. Helm*, 463 U.S. at 290. The Supreme Court never has approved a life sentence, with no possibility of parole for 50 years, for conduct that otherwise would be treated as a misdemeanor. If any sentence violates the constitutional standard of "gross disproportionality," it is Andrade's sentence of 50 years to life in prison for two counts of stealing videotapes worth a total of $153.

The State's argument for deference to the political process has no limiting principle. Under the State's approach, any offense, no matter how trivial, could be punished by life imprisonment. The State contends that the only unconstitutional punishments are "those sentences that are not susceptible to debate among reasonable minds." Pet. Br. at 36. This approach would replace the three-part test from *Solem v. Helm*, which focuses on objective factors, with a very subjective test. Such an approach, besides being totally subjective, would allow "the views of one such judge who might think that relief is not warranted in a particular case [to] always have greater weight than the contrary, considered judgment of several other reasonable judges." *Williams v. Taylor*, 529 U.S. 362, 377-78 (2000).

2. Under the federal habeas corpus statute, relief is available if a state court decision is "contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). In *Williams v. Taylor*, 529 U.S. at 404-405, this Court explained that §2254(d)(1)'s "contrary to" and "unreasonable application"

clauses have independent meaning, and a writ of habeas corpus is appropriate if either requirement is met.

The California Court of Appeal's decision was "contrary to" clearly established federal law because it applied "a different rule from the governing law set forth" in Supreme Court decisions and because it decided a case differently than the Supreme Court did "on a materially indistinguishable set of facts." *Bell v. Cone*, 122 S.Ct. 1843, 1850 (2002). Specifically, the California Court of Appeal did not apply the proportionality analysis required by *Solem* and *Harmelin*. Instead, the state court "question[ed]" whether "proportionality analysis applies under . . . [the] federal constitution." App. to Cert. Pet. at 77. The state court said: "[T]o the extent [Andrade] suggests that proportionality analysis applies under both the state and federal constitutions, we must question that assertion." *Id.* It further stated that "the current validity of the *Solem* proportionality analysis is questionable in light of *Harmelin*." *Id.* at 78.

This Court, however, has repeatedly cited with approval to *Solem*, *see, e.g., Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434-35 (2001); *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). Moreover, in *Harmelin*, seven Justices expressly concluded that proportionality analysis is required by the Eighth Amendment. By ignoring this Court's precedents, the California state courts acted "contrary to" clearly established federal law. In addition, the California Court of Appeal acted "contrary to" federal law by not following *Solem v. Helm*, which is materially indistinguishable from this case.

Finally, the California Court of Appeal "unreasonably" applied clearly established federal law by holding that an

indeterminate life sentence, with no possibility of parole for 50 years, for stealing $153 worth of videotapes, did not violate the Eighth Amendment. The State's position that the appropriate inquiry is "whether the question is susceptible to debate among reasonable minds," Pet. Br., at 29-30, is virtually identical to the standard that this Court rejected in *Williams v. Taylor*, 529 U.S. at 377-78.

ARGUMENT

I. AN INDETERMINATE LIFE SENTENCE, WITH NO POSSIBILITY OF PAROLE FOR 50 YEARS, FOR THE MISDEMEANOR CONDUCT OF SHOPLIFTING $153 WORTH OF VIDEOTAPES, IS GROSSLY EXCESSIVE AND THUS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT[1]

[1] The State raises the issue of whether a federal court should decide whether a state court decision was erroneous before determining whether the state court decision was contrary to or an unreasonable application of clearly established federal law. Pet. Br. at 34. This issue also is raised in the *amicus* brief of the Criminal Justice Legal Foundation.

However, there is no reason for this Court to address this issue in this case because the order of analysis would make no difference here. For the reasons described in Part II below, the state court's decision was "contrary to" and an "unreasonable application" of federal law because the state court failed to apply the controlling test prescribed by this Court for the Eighth Amendment. This is exactly the same reason why the state court determination was erroneous, as explained in Part I.

In fact, as this case illustrates, analysis often is clearer if a federal court first decides the content of the law and whether the state court decision was erroneous and then determines whether it was "contrary to" or an "unreasonable application" of federal law. The Ninth Circuit's opinion, and all of the briefs before this Court, begin with an analysis of

(Continued on following page)

A. Grossly Disproportionate Punishments Violate the Cruel and Unusual Punishment Clause of the Eighth Amendment

This Court recently declared: "The Eighth Amendment succinctly prohibits 'excessive sanctions.'" *Atkins v. Virginia*, 122 S.Ct. 2242, 2246 (2002). Almost a century earlier, in *Weems v. United States*, 217 U.S. 349, 367 (1910), the Court held that the Eighth Amendment prohibits "greatly disproportioned" sentences and stated "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." On other occasions, too, this Court has declared sentences unconstitutional as being "grossly disproportionate." For example, in *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the Court held that "a sentence of death is grossly disproportionate and excessive for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." In *Solem v. Helm*, 463 U.S. 277 (1983), the Court held that it was grossly disproportionate to sentence a person to life imprisonment for passing a bad check for $100 because of six prior non-violent offenses. Justice

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the Eighth Amendment and whether the sentence imposed on Andrade is grossly disproportionate. Only following this analysis is it possible to determine whether the state court's decision approving the sentence was "contrary to" or an "unreasonable application" of federal law. Logically, the content of the law must be determined before it is possible to assess whether a decision is "contrary to" or an "unreasonable" application of this law. For exactly this reason, in the qualified immunity context, this Court has said that federal courts first are to decide the content of the constitutional right and then to determine whether it is a clearly established right that a reasonable officer should know. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

Powell, writing for the Court, observed that "the Court has continued to recognize that the Eighth Amendment prohibits grossly disproportionate punishments." *Id.* at 288 (citations omitted).

In *Harmelin v. Michigan*, 501 U.S. 957 (1991), seven Justices endorsed the principle that grossly disproportionate sentences are unconstitutional. Only Chief Justice Rehnquist joined Justice Scalia's opinion arguing otherwise. *Id.* at 985. Expressly disagreeing with Justice Scalia, Justice Kennedy declared in his concurring opinion that "*stare decisis* counsels [this Court's] adherence to the narrow proportionality principle that has existed in Eighth Amendment jurisprudence for 80 years." *Id.* at 995 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy explained: "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly' disproportionate to the crime." *Id.* at 1001. Justices O'Connor and Souter joined this opinion and its conclusion that grossly disproportionate punishments are unconstitutional. The four dissenting Justices in *Harmelin*, actually the plurality in the case, argued that the Eighth Amendment prohibits disproportionate sentences and concluded that "gross disproportionality" was too restrictive a constitutional standard. *Id.* at 1009, 1012 (White, J., dissenting); *id.* at 1027 (Marshall, J., dissenting).

No decision since *Harmelin* has questioned the principle established by almost a century of Eighth Amendment decisions: grossly disproportionate punishments are cruel and unusual punishment in violation of the Eighth Amendment. In *United States v. Bajakajian*, 524 U.S. 321, 336 (1998), the Court, in an opinion by Justice Thomas,

invalidated a forfeiture as violating the "excessive fines" clause of the Eighth Amendment and stated: "[W]e therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents."[2]

Indeed, the idea that grossly excessive punishments are cruel and unusual punishment is not new; it was part of English law for hundreds of years before the founding of the United States. As this Court has long recognized, the requirements of the Eighth Amendment were "taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta." *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (footnote omitted). Blackstone, in his Commentaries, observed that the Magna Carta, in 1215, prohibited excessive punishments. Blackstone, *Commentaries*, at *10.

As prison sentences became more common in later years, the English courts were equally insistent that "imprisonment ought always to be according to the quality of the offense." *Hodges v. Humkin*, 80 Eng.Rep. 1015, 1016 (KB 1615). In 1689, the English Bill of Rights adopted the reference to "cruel and unusual" punishments that was repeated verbatim by the framers of the Eighth Amendment. Only three months later, that language was interpreted by the House of Lords, which declared that a "fine

[2] The Court's adopting gross disproportionality analysis for the "excessive fines" clause of the Eighth Amendment is relevant here because, as the Court stated in *Solem v. Helm*, "It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of prison were not." 463 U.S. at 289.

of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon was excessive and exorbitant, against magna charta, the common right of the subject, and the law of the land." *Earl of Devon's Case*, 11 State Tr. 133, 136 (1689), *quoted in Solem*, 463 U.S. at 285.

In fact, Blackstone specifically wrote that the prohibition of cruel and unusual punishment forbids excessively harsh sentences for recidivist conduct. Blackstone discussed the permissibility of capital punishment for those who repeatedly violated statutes prohibiting loaded wagons on public roads. Blackstone said that such a punishment for recidivism was impermissible because "the evil to be prevented is not adequate to the violence of the preventive" and the punishment would violate "dictates of conscience and harmony." Blackstone, *Commentaries*, at *10.

This principle of proportionality also was reflected in colonial laws, which served as the source of many constitutional provisions. The Maryland Charter of 1632, for example, authorized penalties if "the Quality of the offense requires it." *Sources of Our Liberties* (R. Perry & J. Cooper eds.) 107 (1959). The Massachusetts Body of Liberties of 1641 allowed whipping only if the "crime be very shamefull." *Id.* And the Charter of Rhode Island, adopted in 1663, explicitly extended proportionality to prison sentences, requiring "the imposing of lawfull and reasonable ffynes . . . and imprisonments." *Id.* at 773.

Following independence, numerous state constitutions adopted a similar view. The Pennsylvania Constitution of 1776 called for a revision of the penal system to make "punishments in some cases less sanguinary and in general more proportionate to the crime." Pa.Const. §38

(1776). The South Carolina Constitution also instituted reform to make punishments "more proportionate to the crime." S.C.Const. §XL (1776). When George Mason copied a cruel and unusual punishment clause almost verbatim into the Virginia Declaration of Rights, he intended to include the protections of both the English Bill of Rights and the common-law rights of Englishmen as publicized by Blackstone. *Solem v. Helm*, 463 U.S. at 285 n.10. His goal, and that of the Eighth Amendment, was to continue the ban on disproportionate punishment.

Of course, "a claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins v. Virginia*, 122 S.Ct. at 2247. This Court recently reaffirmed that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.*, *quoting Trop v. Dulles*, 356 U.S. at 100-101.

B. The Imposition of an Indeterminate Life Sentence, With No Possibility of Parole for 50 Years, Is Grossly Disproportionate When, as Here, It Is Imposed for Conduct that Generally Would Be Regarded as a Misdemeanor

1. Under objective criteria prescribed by the Supreme Court, an indeterminate life sentence, with no possibility of parole for 50 years, is grossly excessive when imposed for shoplifting $153 worth of videotapes

This Court repeatedly has stated that proportionality is to be determined by "objective factors to the maximum possible extent." *Rummel v. Estelle*, 445 U.S. at 274-275; *Atkins v. Virginia*, 122 S.Ct. at 2247. In *Solem v. Helm*, 463 U.S. at 292, the Court stated such objective criteria: "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions." In *Harmelin v. Michigan*, Justice Kennedy's concurring opinion agreed with *Solem*'s holding that a grossly disproportionate sentence of imprisonment violates the Eighth Amendment. 501 U.S. at 1001. Justice Kennedy also agreed with *Solem's* three-part test. Justice Kennedy said, though, that courts need not examine the second and third factors mentioned in *Solem* – the intra-jurisdictional and inter-jurisdictional reviews – unless a "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* at 1005.

Under these well-established criteria, Andrade's sentence was grossly disproportionate to the offense. First, the offense was minor, shoplifting a small amount of merchandise that was recovered before he left the store, but the punishment was extreme: a sentence of 50 years to life in prison. Under California law, this is deemed to be an indeterminate life sentence, *People v. Dozier*, 93 Cal.Rptr.2d 600, 605-06 (2000). Andrade is not eligible for parole until he has served 50 years in prison. *In re Cervera*, 16 P.3d 176, 177 (Cal. 2000). For Andrade, this is likely a life sentence; he will not be eligible for consideration for release from prison until the year 2046 when he will be 87 years old.

Andrade's crime is very similar to that in *Solem v. Helm*, where this Court found that a life sentence for "uttering a no account check" worth about $100 violated the Eighth Amendment. The crimes of both Jerry Helm and Leandro Andrade "involved neither violence nor [the] threat of violence to any person" and a "relatively small amount of money." 463 U.S. at 296.[3] Both passing a bad check and shoplifting are the types of crime that are "viewed by society as among the less serious offenses." *Id.* Furthermore, as the Court of Appeals explained, "[b]y classifying such conduct as a misdemeanor, the California legislature has indicated that petty theft is regarded as a

[3] The similarities between *Solem v. Helm* and this case are notable: both Helm and Andrade were in their late thirties at the time of conviction for their principle crimes; each had received his first felony conviction approximately 14 years earlier, each for residential burglary; each had a history of nonviolent offenses, principally property crimes; and each was sentenced to life in prison for a minor offense.

relatively minor offense." *Andrade v. Attorney General*, 270 F.3d 743, 759-760 (2001).

The facts of this case are quite different, therefore, from *Harmelin v. Michigan*, where this Court upheld a life sentence for possession of more than 650 grams of cocaine. As Justice Kennedy noted, Harmelin possessed enough cocaine for between 32,500 and 65,000 doses. 501 U.S. at 1002. Justice Kennedy distinguished Harmelin's offense from the "relatively minor, nonviolent crime at issue in *Solem*," concluding that Harmelin's crime was "as serious and violent as the crime of felony murder without specific intent to kill." *Id.* at 1004. The same cannot be said here. Andrade's shoplifting, like Solem's bad check, did not pose a "grave harm to society." *Id.* at 1002.[4] Yet, the punishment

[4] This case is distinguishable from *Harmelin* in another important respect. In *Harmelin*, Justice Kennedy emphasized that the law "provide[d] clear notice of the severe consequences that attach to possession of drugs in wholesale amounts." 501 U.S. at 1008. Justice Kennedy stressed that Michigan's law was not one where "the complexity of the scheme obscures the possible sanction for a crime, resulting in a shock to the offender who learns the severity of his sentence only after he commits the crime." *Id.*

California's Three Strikes law, in contrast to the Michigan law, did not provide "clear notice" to defendants in Andrade's position regarding the severity of the penalty, and "the complexity of the scheme" did obscure "the possible sanction for a crime." First, when Andrade committed his shoplifting in November 1995, no published appellate decision had held that a defendant could get two strikes from a single past case. The first case to so hold, *People v. Allison*, 41 Cal.App.4th 481, 48 Cal.Rptr.2d 756 (1995), was filed December 29, 1995, after Andrade's current offenses. Second, when Andrade engaged in shoplifting, the California Supreme Court had not yet settled whether consecutive sentences were required for multiple offenses. This did not occur until *People v. Deloza*, 18 Cal.4th 585, 76 Cal.Rptr.2d 255 (1998). The Three Strikes sentencing provisions are labyrinthine, to say the least, and a defendant well could have been "shocked" to learn that a

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imposed on Andrade, an indeterminate life sentence with no possibility of parole for 50 years, is essentially the same sentence that the Supreme Court declared unconstitutional when imposed on a seven-time recidivist felon in *Solem*.

Rummel v. Estelle, 445 U.S. 263 (1983), also is easily distinguishable. In *Rummel*, this Court upheld a life sentence for obtaining $120.75 by false pretenses because Rummel was eligible for parole within 12 years. Andrade, by contrast, must serve more than four times the length of Rummel's sentence before he becomes eligible for parole.

The second factor to be considered is the sentences imposed on other criminals in the same jurisdiction. Under California law, Andrade's crimes constitute petty theft – theft of goods or money worth less than $400 – a misdemeanor punishable by a fine or a jail sentence of six months or less. Cal. Penal Code §490. The penalty for two counts of petty theft, punished to the maximum of one year in jail, is vastly different from a sentence of 50 years to life in prison.

Petty theft with a prior – that is, when committed after a conviction and time served for petty theft, grand theft, auto theft, burglary, carjacking, robbery, receiving or

50-years-to-life rather than a 25-years-to-life sentence was required. Third, at the time Andrade committed his current offenses, the California Supreme Court had not determined how much of a 25-to-life sentence a defendant must serve before being eligible for parole. It was not until 2001, in *In re Cervera*, 24 Cal.4th 1073, 103 Cal.Rptr.2d 762 (2001), that it was decided that 25 years of a 25-to-life sentence, or 50 years when two such sentences are imposed consecutively, must be served before there is eligibility for parole.

concealing stolen property – is a "wobbler" and thus is punishable either as a misdemeanor with up to one year in county jail or as a felony with up to three years in state prison. Cal. Penal Code Ann. §§666, 496. Two counts of petty theft with a prior, prosecuted as felonies, would receive a maximum sentence of three years, eight months.[5]

In fact, for purposes of the intra-jurisdictional comparison, it is noteworthy that if Andrade's prior convictions had been for violent crimes, such as murder or manslaughter, his maximum punishment for the two acts of shoplifting would have been one year in prison. Under California law, the felony of petty theft with a prior requires that there be a prior property crime; if petty theft is committed after multiple prior convictions for non-theft offenses, including serious and violent offenses, then the petty theft must be charged as a misdemeanor and cannot trigger application of the Three Strikes law. Cal. Penal Code Ann., §§490, 666. So, for example, if Andrade's prior convictions had been for felonious assault or manslaughter or rape, only a one year sentence for two counts of petty theft would have been possible.

The gross disproportionality of Andrade's sentence is revealed by comparing, as required by *Solem* and *Harmelin*, his sentence to that imposed by the same jurisdiction for other crimes. As the Court of Appeals noted: "Andrade's indeterminate sentence of 50 years to life is

[5] Under Cal. Penal Code §1170.1(a), a defendant receives only one-third of the middle term of the second count in this situation; here it would be one-third of a middle term of two years, that is, eight months. Therefore, the maximum sentence for two counts of petty theft with a prior would be three years and eight months in prison.

exceeded in California only by first-degree murder and a select few violent crimes." *Andrade v. Attorney General*, 270 F.3d at 762. For example, in California, voluntary manslaughter is punishable by up to 11 years in prison, Cal. Penal Code §193; rape is punishable by up to eight years in prison, Cal. Penal Code §264; second degree murder is punishable by 15 years to life in prison, Cal. Penal Code §190; and sexual assault on a minor is punishable by up to eight years in prison, Cal. Penal Code §288.

Finally, in evaluating gross disproportionality, as *Solem* and *Harmelin* require, courts are to consider the sentences imposed in other jurisdictions. As Justice Stevens recently noted: California is the "only state in the country in which a misdemeanor could receive such a severe sentence." *Riggs v. California*, 525 U.S. 1114 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). As the court below amply demonstrated in its catalogue of recidivist statutes, a defendant like Andrade would not have faced a fifty-year-to-life sentence for his offenses anywhere but in California or Louisiana; and in Louisiana, he would have had a strong claim for relief under the state constitution. *Andrade v. Attorney General*, 270 F.3d at 763.

Petty theft with a prior qualifies for recidivist sentencing in only four other jurisdictions: Rhode Island, West Virginia, Texas and Louisiana. But Rhode Island's recidivist statute is not triggered by theft of less than $100, *see* R.I. Gen. Laws §§11-41-20(d), 12-19-21(a) (1981), and West Virginia does not count non-violent priors such as Andrade's previous offenses. *See State v. Deal*, 358 S.E.2d 226, 231 (W.Va. 1987). Furthermore, under Texas law,

parole is generally available in 15 years or less. *See* Tex. Gov't Code Ann. §508.145(f) (Vernon 1998).

Although Louisiana, in 1995, might have imposed a comparable sentence for shoplifting, it has since amended its law so that petty theft (even with Andrade's prior record) cannot trigger recidivist sentencing. *See* 2001 La. Sess. Law Serv. 403 (West). Even under the older law, such a sentence would quite possibly have been held excessive under the state constitution. *See State v. Hayes*, 739 So.2d 301, 303-304 (La.Ct.App. 1999) (invalidating, as excessive under the state constitution, a life sentence for misappropriating over $500, where prior record was minor); *State v. Burns*, 723 So.2d 1013, 1018-20 (La.Ct.App. 1998) (invalidating, as excessive, under state constitution, a life sentence for possession and distribution of crack cocaine, where prior record was non-violent and mitigating circumstances existed).

In *Solem v. Helm*, this Court noted that another state authorized life without parole under similar circumstances, but the Court said that it was "not advised that any defendant [in that other state], whose prior offenses were so minor, actually ha[d] received the maximum penalty." 463 U.S. at 299-300. California has not identified any other defendant, in Louisiana or elsewhere in the United States, other than in California, regardless of background, who has received an indeterminate life sentence, with no parole possible for 50 years, for shoplifting.

The State, in its brief to this Court, concedes that California's law "is the most stringent in the nation," but says that should not make it "suspect." Pet. Br. at 22. In

its recent decision in *Atkins v. Virginia*, this Court emphasized that a majority of states prohibiting the death penalty for the mentally retarded demonstrated a "consensus" and that such executions were thus cruel and unusual punishment in violation of the Eighth Amendment. 122 S.Ct. at 2249. Forty-nine of 50 states would not permit the life sentence for misdemeanor shoplifting that was imposed on Andrade. The State's acknowledgment that California's law is the most stringent and that Andrade could not have received his sentence in any other state makes his punishment more than merely "suspect"; it provides a compelling basis for concluding that Andrade's sentence is grossly disproportionate and violates the Eighth Amendment.

Application of the *Solem/Harmelin* test confirms what should in any event be clear: the sentence of 50 years to life that Andrade received for shoplifting was both cruel and unusual. In assessing the cruelty of a particular sentence, this Court has explained that "courts are competent to judge the gravity of an offense, at least on a relative scale." *Solem v. Helm*, 463 U.S. at 292. In particular, this Court has observed that "[s]tealing a million dollars is viewed as more serious than stealing a hundred dollars – a point recognized in statutes distinguishing petty theft from grand theft." *Id.* at 293. Here, Andrade was convicted for shoplifting videotapes worth $153.64, an amount well below the dividing line California has established distinguishing petty theft from grand theft. Cal. Penal Code §487(a) (grand theft is stealing property worth more than $400).

Andrade's punishment is also "unusual" – under any common understanding of that term – because California is the only state in which misdemeanor conduct can be the

basis for a sentence of 25 years to life in prison; let alone, as here, 50 years to life in prison. Indeed, other states have expressly ruled that it is unconstitutional to impose a life sentence for misdemeanor conduct. For example, in *People v. Gaskins*, 923 P.2d 292 (Colo. App. 1996), the Colorado court found that it violates the United States Constitution to impose a life sentence for misdemeanor conduct, even if there have been prior felony convictions. *See also State v. Deal*, 358 S.E.2d 226, 231 (W.Va. 1987) (life sentence imposed for non-violent third offense violated state constitution's proportionality requirement). As explained above, in no other state could Andrade have received this sentence for his conduct. This Court's Eighth Amendment jurisprudence has often "look[ed] to other jurisdictions in deciding where lines between sentences should be drawn." *Solem v. Helm*, 463 U.S. at 295. On these facts, the line is unwavering, and only California is on the other side of it.

If any sentence is "grossly disproportionate," surely this case is it. Andrade was sentenced to an indeterminate life sentence, with no possibility of parole for 50 years, for two acts of sholifting videotapes worth a total of $153.54.

2. Although the government constitutionally may punish recidivist conduct harshly, a life sentence for conduct that otherwise would be a misdemeanor violates the Eighth Amendment

The Supreme Court has recognized that generally the government may punish recidivist conduct harshly. *See, e.g., Rummel v. Estelle*, 445 U.S. at 278. But there are several reasons why this principle does not justify the

sentence imposed here and why *Rummel* is distinguishable. First, California essentially "double counts" the prior offenses. Under California law, Andrade's conduct generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. Cal. Penal Code §490. Because of his prior offenses, Andrade's misdemeanor conduct is converted by statute into a "wobbler," "petty theft with a prior conviction." Cal. Penal Code §666. Once prosecuted as a felony, that felony is used, under the Three Strikes law, to impose a sentence of 25 years to life in prison on each count. In other words, the prior offenses are used twice: first to convert a misdemeanor into a felony and then to impose a life sentence based on it being a felony.

States can punish recidivists more harshly, but there is a limit. In *Rummel v. Estelle*, the Court expressed the need for great deference to legislative choices regarding punishments for recidivists, but stated: "This is not to say that a proportionality principle would not come into play in [an] extreme example . . . , if a legislature made overtime parking a felony punishable by life imprisonment." 445 U.S. at 274 n.11. Yet, that is exactly what California does through its double counting; a misdemeanor is deemed a felony because of the prior offenses and then as enhanced, the relatively trivial conduct, twice stealing videotapes worth less than $100, becomes the basis for a sentence of 50 years to life imprisonment.

Second, this Supreme Court never has approved such harsh sentences for misdemeanor conduct, even when the offender is a recidivist. The distinction between misdemeanors and felonies is deeply embedded in the law. The Court recently recognized the fundamental historical

difference between felony and misdemeanor conduct. In *Apprendi v. New Jersey*, 530 U.S. 466, 480 n.7 (2000), the Court observed that "[t]he common law punishment for misdemeanors – those smaller faults, and omissions of less consequence" did not include prison sentences. The Court stated that "[a]ctual sentences of imprisonment for such offenses, however, were rare at common law until the 18th century for 'the idea of prison as a punishment would have seemed an absurd expense.'" *Id.* at 480 n.7 (citations omitted).

In *Rummel v. Estelle*, this Court repeatedly emphasized that it was considering permissible punishment for felony conduct. *See* 445 U.S. at 274, 278, 284. In fact, the Court stressed the "line dividing felony theft from petty larceny." *Id.* at 284. *Rummel* involved felony theft, while this case concerns what California deems to be petty theft.

Justice Stevens recently explained the importance of this distinction: "While this Court has traditionally accorded to state legislatures considerable (but not unlimited deference) to determine the length of sentences 'for crimes concededly classified and classifiable as felonies,' petty theft does not fall into that category." *Riggs v. California*, 525 U.S. at 1114 (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). Indeed, Justice Stevens said that punishing petty theft with a prior conviction by imposing a life sentence is closely analogous to the punishment declared unconstitutional in *Solem*: "[P]etty theft has many characteristics in common with the crime for which we invalidated a life sentence in *Solem*, uttering a 'no account' check for $100. 'It involves neither violence nor (the) threat of violence to any person'; the amount of money involved is relatively small; and the State treats the crime as a felony (here, only under some

circumstances) pursuant to a quirk in state law." *Id.* at 1114 (citations omitted).[6]

Third, although a state may impose harsher punishments on recidivists, Andrade cannot be punished now for his earlier offenses. That unquestionably would violate the Constitution's prohibition on double jeopardy. *See, e.g., North Carolina v. Pearce*, 395 U.S. 711, 717-718 (1969); *Ex parte Lange*, 85 U.S. 163, 172 (1873) (double jeopardy is violated if there is subsequent punishment for the same offense). Nor can a defendant be punished for the "status" of being a felon. *See, e.g., Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962) (status cannot constitutionally be made a crime). Therefore, the punishment must be proportionate for *this* offense, while taking into account the individual's prior criminal record. *Witte v. United States*, 515 U.S. 389, 400 (1995) ("the enhanced punishment imposed for the [present] offense is not to be viewed as an . . . additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repeated one.") As this Court declared in *Solem v. Helm*: "In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." 463 U.S. at 290.

[6] In *Harmelin v. Michigan*, Justice Scalia, in an opinion joined only by Chief Justice Rehnquist, recognized the possibility of "extreme examples" of very harsh punishments for relatively trivial offenses, but said that "they are certain never to occur." 501 U.S. at 985-986. But that is exactly what occurred in this case: Andrade was sentenced to 50 years to life imprisonment for petty theft.

An indeterminate life sentence, with no possibility of parole for 50 years, is obviously not proportionate to the crimes for which Andrade was convicted: stealing $153 worth of videotapes. In *Solem*, the Court said that "[w]e must focus on the principal felony – the felony that triggers the life sentence – since Helm already has paid the penalty for his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision." 463 U.S. at 296 n.21. Andrade's prior offenses, as the state concedes, were for non-violent offenses.[7] Pet. Br. at 15. The sole prior offenses used to trigger the Three Strikes law, and the indeterminate life sentence, were three burglary convictions from the same day in 1983.[8] Although a state may punish recidivists more

[7] Although the State admits, as it must, that Andrade never had committed a violent offense, Pet. Br. at 15, it argues that his crimes had a potential for violence. *Id.* at 15. Likewise, the California District Attorney Association, in its *amicus* brief, says that "shoplifting carries with it violence potential." Brief of *Amicus Curiae* California District Attorney's Association, at 6. Since Andrade had no weapon of any kind with him when the shoplifting occurred, it is impossible to see how violence might have happened. Besides, this speculation should not obscure the fact that Andrade never committed any act of violence, not in this or any prior crime, and is serving an indeterminate life sentence for stealing videotapes from a department store while he was unarmed.

[8] The State, in its brief, recites other crimes that it says that Andrade committed. Pet. Br. at 24. *See also* Brief on the Merits of the Amicus Curiae California District Attorneys Association, at 8. This list of other offenses, however, whether accurate or not, played absolutely no role in the sentence imposed on Andrade. The Felony Complaint filed against Andrade and the Information filed against him listed *only* the burglaries as his prior offenses. Joint App. at 4, 9. The jury found *only* that there were prior convictions for burglary. Joint App. at 18-20. The transcript of the sentencing hearing shows that only the prior burglaries were considered as the basis for the application of the Three Strikes law. Joint App. at 37-69. The other convictions, listed in the probation

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harshly, an indeterminate life sentence, with no possibility of parole for 50 years, is cruel and unusual punishment when imposed in circumstances such as these.

Fourth, the State offers no evidence, and there is none, that punishing shoplifting with life sentences serves any rational purpose. The State attempts to show that the Three Strikes law decreases crime by quoting an editorial written, after this Court granted certiorari, by a sponsor of the legislation. Pet. Br. at 23. But careful studies of the effects of the Three Strikes law have shown that it has had no such effect on crime in California. One empirical study of "the relationship between Three Strikes and the recent decline of crime in California" concluded "that there is no evidence that Three Strikes played an important role in the drop in the crime rate." Linda S. Beres & Thomas D. Griffith, *Did "Three Strikes" Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report*, 32 Loyola L.A. L. Rev. 101, 102 (1998). The most extensive study of the effects of the Three Strikes law, by three prominent professors, also concluded that the "decline in crime observed after the effective date of the Three Strikes law was not the result of the statute." Franklin E. Zimring, Gordon Hawkins & Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* 101 (2001). This is supported by another empirical study which found that "[c]ounties that vigorously and strictly enforce the Three Strikes law did not

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report, whether accurate or inaccurate, played no role in the sentence imposed. Thus, the sole issue is whether it is grossly disproportionate to impose an indeterminate life sentence on Andrade for stealing $153 worth of videotapes in light of his prior convictions for burglary.

experience a decline in any crime category relative to the more lenient counties." Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out Law,"* 11 Stan. L. & Pol'y Rev. 65, 66-67 (1999). Analysts at RAND compared crime rates between "three strikes" states and "non-three strikes" states and found that three strikes laws had no independent effect on the crime rate in states with such statutes. Susan Turner, Peter Greenwood, Elsa Chen & Terry Fain, *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates,* 11 Stan. L & Pol'y Rev. 11, 75 (1999).

Moreover, the State's claim of the overall benefit of the Three Strikes law is irrelevant in this case because the State shows no benefit to imposing an indeterminate life sentence, with no possibility of parole for 50 years, on a person for shoplifting. A state can chose to punish recidivists more harshly, but a life sentence for stealing $153 worth of videotapes makes no rational sense and is clearly grossly disproportionate in violation of the Eighth Amendment.

3. The State's proposed standard, that punishment is cruel and unusual only if the sentence is "not susceptible to debate among reasonable minds," is inconsistent with the decisions of this Court and an undesirable constitutional principle

The State repeatedly urges this Court to defer to the legislative judgment in California that allows a shoplifter to be sentenced to an indeterminate life sentence with no possibility of parole for 50 years. Pet. Br. at 13, 23, 27. In

the State's view, the government may impose virtually any punishment for any crime. The government could, if it chose, impose a life sentence for a traffic ticket, or jaywalking, or literally any offense no matter how trivial. There simply is no limiting principle within the State's argument. This cannot be correct. For almost a century the Supreme Court has been clear that grossly disproportionate punishments violate the Eighth Amendment. *See, e.g., Weems v. United States*, 217 U.S. at 367; *Atkins v. Virginia*, 122 S.Ct. at 2246. Accordingly, there must be a judicially enforceable limit on the state's ability to impose punishments.

In an attempt to offer some content to the Eighth Amendment's prohibition of cruel and unusual punishment, the State argues that the only unconstitutional sentences are "those sentences that are not susceptible to debate among reasonable minds." Pet. Br. at 36. This approach would replace the three-part test from *Solem v. Helm*, which focuses on objective factors, with a very subjective test. What is "susceptible to debate" is entirely a matter of opinion and defies analysis through any objective criteria. The State's approach is thus at odds with this Court's consistent command that "[p]roportionality review . . . should be informed by 'objective factors to the maximum possible extent.'" *Atkins v. Virginia*, 122 S.Ct. at 2247, quoting *Harmelin v. Michigan*, 501 U.S. at 1000, and *Rummel v. Estelle*, 445 U.S. at 274-75.

There is nothing in this Court's prior rulings, or anything in the jurisprudence of the Eighth Amendment, that offers support for the State's claim that a sentence is permissible so long as some reasonable person would defend it. To the contrary, this approach is completely at odds with this Court's consistent holdings that grossly

disproportionate punishments violate the Eighth Amendment, even if some reasonable people in a state want such penalties imposed. As this Court explained in *Gregg v. Georgia*, 428 U.S. 153, 182 (1976), "the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society." The State's approach would mean that the "views of one such judge" who might find a sentence permissible would "always have greater weight than the contrary, considered judgment of several other reasonable judges." *Williams v. Taylor*, 529 U.S. at 377-78.

Moreover, applying the State's proposed standard here offers further indication that the sentence imposed on Andrade violates the Eighth Amendment. It is hard to believe that any reasonable person would believe that an indeterminate life sentence, with no possibility of parole for 50 years, is other than grossly disproportionate when it is for the crime of shoplifting $153 worth of videotapes.[9]

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[9] There is no indication that the California legislature which adopted the Three Strikes law or the voters who approved it in an initiative ever contemplated that it would be used to put a person in prison for 50 years to life for stealing $153 worth of videotapes. The law's goal was to put *violent* criminals in prison for long periods of time. *See* Cal. Ballot Pamphlet Gen. Election 37 (November 8, 1994) ("soft on crime judges, politicians, defense lawyers and probation officers care more about violent felons than they do victims. They spend all of their time looking for loopholes to get rapists, child molesters and murderers out on probation, early parole, or off the hook altogether.") *See also*, Robert J. Caldwell, *Violent Crime: Keeping the Most Violent Criminals Locked Up Is Society's Best Defense*, San Diego Union-Tribune, Dec. 12, 1993, at G1; Deroy Murdock, *Get Tough on Violent Crime; New Bill Promises 'Three-Time Losers' Life Behind Bars*, San Diego Union-Tribune, March 31, 1993, at B9. Andrade's extreme sentence is the unintended consequence of super-imposing the Three Strikes law on

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Unfortunately, change in the California law is very difficult because it was adopted through a voter initiative. The Three Strikes law can be changed only by another initiative or by a statute approved by the voters. *See* Cal. Const. Art. II, §10 ("The Legislature may . . . amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.") *See also People v. Snyder*, 22 Cal.4th 304, 311, 92 Cal.Rptr.2d 734 (2000) (describing the process for changing statutes adopted through the initiative process).

II. ANDRADE IS ENTITLED TO A WRIT OF HABEAS CORPUS BECAUSE THE STATE COURT'S DECISION WAS "CONTRARY TO" AND AN "UNREASONABLE" APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

The federal habeas corpus statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, requires a federal court to grant habeas corpus relief to a state prisoner if the state court's decision is "contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). In *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000), this Court explained that §2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning and a writ of habeas corpus is appropriate if either requirement is met.

California statutes that already punish recidivist property offenders more harshly through the crime of petty theft with a prior.

Federal courts are not required to defer to state court determinations of constitutional law and must decide *de novo* what is clearly established federal law. *Id.* at 401.

Recently, in *Bell v. Cone*, 122 S.Ct. 1843, 1850 (2002), this Court explained the requirements for relief under §2254(d)(1):

> A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a different rule from the governing law set forth in our cases, or if it decides a case differently than we have done on a materially indistinguishable set of facts. The Court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decision but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court's application of clearly established law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one. (citations omitted)

The Court of Appeals was correct in granting Andrade a writ of habeas corpus because the state court's decision was both "contrary to" and an "unreasonable" application of clearly established federal law.

A. The California Court of Appeal Decision Approving an Indeterminate Life Sentence, With No Possibility of Parole for 50 Years, for Shoplifting Was "Contrary To" Clearly Established Federal Law

The indeterminate life sentence imposed on Andrade was "contrary" to clearly established federal law both

because the California Court of Appeal applied "a different rule from the governing law set forth" in Supreme Court decisions and because it decided a case differently than this Court did "on a materially indistinguishable set of facts." *Bell v. Cone*, 122 S.Ct. at 1850.

As discussed above, this Court long has held that grossly disproportionate punishments violate the Eighth Amendment and in *Solem v. Helm*, 463 U.S. at 291, 304, it prescribed a three-part test for determining whether a sentence violates the Eighth Amendment. In *Harmelin v. Michigan*, seven Justices reaffirmed this principle. *See, e.g.*, 501 U.S. at 1005 (Kennedy, J., concurring). Virtually every federal court of appeals has recognized the "rule of *Harmelin*" and treats as controlling Justice Kennedy's opinion's threshold inquiry of gross disproportionality and its affirmation of the continuing validity of *Solem*. *See, e.g., Spearman v. Burkett*, 10 Fed.Appx. 288 (6th Cir. 2001); *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001); *United States v. Jones*, 213 F.3d 1253 (10th Cir. 2000); *United States v. Valenti*, 199 U.S.App. LEXIS 26949 (7th Cir. 1998); *United States v. Harris*, 154 F.3d 1082 (9th Cir. 1998); *United States v. Cardoza*, 129 F.3d 6 (1st Cir. 1997); *United States v. Kratsas*, 45 F.3d 63 (4th Cir. 1995); *United States v. Brant*, 62 F.3d 367 (11th Cir. 1995); *McGruder v. Puckett*, 954 F.2d 313 (5th Cir. 1992); *United States v. Salmon*, 944 F.2d 1106 (3d Cir. 1991). Moreover, the Second Circuit recently cited to Justice Kennedy's opinion in *Harmelin* to support the application of proportionality analysis to life sentences. *See Matias v. Artuz*, 8 Fed.Appx. 9, 10 (2d Cir. 2001).

Thus, federal law is clearly established, by decisions of this Court, that the constitutionality of Andrade's indeterminate life sentence for shoplifting should be

determined using the *Solem/Harmelin* framework. The California Court of Appeal therefore should have compared the harshness of the punishment with the gravity of the offense to determine if it gives rise to an inference of gross disproportionality. If so, then both intra-jurisdictional and inter-jurisdictional analyses should have been undertaken to ascertain whether the sentence was grossly disproportionate.

But the California Court of Appeal did not follow this law or apply this analysis. The court never compared the gravity of the offense with the harshness of the punishment. Instead, the state court "question[ed]" even whether "proportionality analysis applies under . . . [the] federal constitution." App. to Cert. Pet. at 77. The state court said: "[T]o the extent [Andrade] suggests that proportionality analysis applies under both the state and federal constitutions, we must question that assertion." *Id.* It further stated that "the current validity of the *Solem* proportionality analysis is questionable in light of *Harmelin*." *Id.* at 78. This was clearly wrong because of *Solem*, this Court's repeated citation to it, *see, e.g., Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434-35 (2001); *United States v. Bajakajian*, 524 U.S. at 336, and its express reaffirmation by seven Justices in *Harmelin*.

The state court expressly disregarded the test prescribed in *Solem* and *Harmelin* and instead applied only *Rummel* in approving Andrade's life sentence for shoplifting. This, too, was plainly "contrary to" clearly established federal law because in *Solem* this Court declared: "[S]ince the *Rummel* Court . . . offered no standards for determining whether an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation." 463 U.S. at 303 n.32. Moreover, in relying solely on *Rummel*,

the state court ignored a crucial distinction between this case and *Rummel*: Rummel was eligible for parole in 12 years, 445 U.S. at 280-281, but Andrade is not eligible for parole for at least 50 years. Also, Rummel's crime was a felony under Texas law; Andrade's conduct was a misdemeanor under California law until his prior offenses were used to make it into a felony and trigger the application of the Three Strikes law.

By expressly disregarding *Solem* and *Harmelin*, and failing to engage in proportionality analysis under the Eighth Amendment,[10] the California Court of Appeal acted "contrary to" clearly established federal law as prescribed by this Court. Moreover, the state court's decision was "contrary to" federal law in that it decided a case differently than the Supreme Court did "on a materially indistinguishable set of facts." *Bell v. Cone*, 122 S.Ct. at 1850. As explained above, the factual similarities between this case and *Solem v. Helm* make that case materially indistinguishable. Both Andrade and Helm were in their mid-thirties when sentenced to life in prison. *Compare Solem*, 463 U.S. at 297 n.22 (noting that Helm was 36 at sentencing), with *Andrade*, 270 F.3d at 759 (noting that Andrade was 37 at sentencing). Both had received their first felony convictions approximately 15 years earlier, each for residential burglary. *Compare Solem*, 463 U.S. at 279, 281 n.6 (Helm's first conviction was in 1964; the life

[10] The only discussion of proportionality analysis in the state court decision was in connection with the "cruel and unusual" claim under the California state constitution. App. to Cert. Pet. at 76. There was no discussion of proportionality under the Eighth Amendment because the court deemed *Solem* to no longer be good law in requiring proportionality analysis.

sentence was imposed in 1979), with *Andrade*, 270 F.3d at 748 (first conviction in 1983, indeterminate life sentence was imposed in 1996). Both had purely non-violent prior records, principally financial and property crimes. *Compare Solem*, 463 U.S. at 279-280 (listing "six non-violent felonies"), with *Andrade*, 270 F.3d at 761 ("All of [Andrade's prior] offenses were non-violent.") Both grappled with substance abuse problems. *Compare Solem*, 461 U.S. at 297 n.22 (noting Helm's alcohol addiction), with *Andrade*, 270 F.3d at 748 (describing Andrade as "a longtime heroin addict"). Both received a life sentence, under state recidivist statutes for minor offenses: Helm for uttering a no account check worth approximately $100; Andrade for shoplifting $153 worth of videotapes.

This case is thus materially indistinguishable from *Solem v. Helm* and the California Court of Appeal acted "contrary to" clearly established federal law in refusing to apply and follow that decision.[11]

B. The California Court of Appeal Decision Approving an Indeterminate Life Sentence, With No Possibility of Parole for 50 Years, Was an "Unreasonable Application" of Clearly Established Federal Law

Habeas corpus relief also is appropriate if a state court "unreasonably applies" clearly established federal

[11] The State characterizes the state court as simply not following the "reasoning" in *Solem*. Pet. Br. at 31. This characterization, however, fails to recognize that the state court ignored the controlling test under the Eighth Amendment as prescribed in *Solem* and *Harmelin* and fails to acknowledge that this case is materially indistinguishable from *Solem v. Helm*.

law to the facts of the particular case. As explained above, this Court has consistently held for almost a century that grossly disproportionate punishments violate the Eighth Amendment. *Weems v. United States*, 217 U.S. at 367; *Atkins v. Virginia*, 122 S.Ct. at 2246. As argued above, an indeterminate life sentence, with no possibility of parole for 50 years, for stealing $153 worth of videotapes, is clearly grossly disproportionate. The state court unreasonably applied federal law in approving this sentence. As the Ninth Circuit explained: "[The state court's] disregard for *Solem* results in an unreasonable application of clearly established Supreme Court law. . . . The state court's failure to address *Solem* yields an unreasonable conclusion that a non-violent recidivist sentenced to such a severe sentence for two misdemeanor offenses does not raise an inference of gross disproportionality." 270 F.3d at 766.

The State repeatedly argues that the appropriate inquiry is "whether the question is susceptible to debate among reasonable minds." Petitioner's Brief on the Merits, at 29-30; *see also*, *id.*, at 27 (law is not clearly established "if a survey of the legal landscape shows reasonable jurists may differ about the outcome.") This is virtually identical to the definition of "unreasonable application" of federal law that this Court rejected in *Williams v. Taylor*. In rejecting the Fourth Circuit's conclusion that a state court judgment is unreasonable only if all reasonable jurists would agree that the state court was unreasonable, this Court stated:

> But the statute says nothing about "reasonable judges," presumably because all, or virtually all, such judges occasionally commit error; they make decisions that in retrospect may be characterized as "unreasonable." Indeed, it is most unlikely that Congress would impose such a requirement of unanimity on federal judges. As Congress is acutely aware, reasonable lawyers and lawgivers regularly disagree with one another. Congress surely did not intend that the views of one such judge who might think that relief is not warranted in a particular case should always have greater weight than the contrary, considered judgment of several other reasonable judges.

529 U.S. at 377-78.

Simply put, the state court's approval of an indeterminate life sentence, with no possibility of parole for 50 years, for shoplifting $153 worth of videotapes is an unreasonable application of the clearly established principle that grossly disproportionate punishments violate the Eighth Amendment.

CONCLUSION

For almost a century, this Court has held that grossly disproportionate punishments violate the cruel and unusual punishment clause of the Eighth Amendment. If any punishment is grossly disproportionate, it is Andrade's sentence of 50 years to life in prison for shoplifting $153 worth of videotapes. The California Court of Appeal in affirming this sentence acted "contrary to" clearly established federal law and "unreasonably" applied legal

principles long established by this Court. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 01-1127

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioner-Appellee,*

v.

LEANDRO ANDRADE, *Respondent-Appellant.*

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITIONER'S REPLY BRIEF ON THE MERITS

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BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioner-Appellee,*

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ARGUMENT

I.

ANDRADE'S SENTENCE IS NOT CRUEL AND UNUSUAL PUNISHMENT

In the opening brief on the merits, Petitioner argued Andrade's sentence is not one of the exceedingly rare terms of imprisonment prohibited by the Eighth Amendment as cruel and unusual punishment. In response, Andrade generally acknowledges the principles Petitioner relied upon, but nevertheless argues there is an inference of gross disproportionality here which is validated by intra-jurisdictional and inter-jurisdictional comparisons. In support of his arguments, Andrade primarily relies on *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L. Ed. 2d 637 (1983), and *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), and tries to distinguish the instant matter from *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L. Ed. 2d 382 (1980), and *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L. Ed. 2d 836 (1991).

As to *Solem*, Andrade maintains his crimes are very similar to the crimes the defendant committed there, in that in neither case was there any violence or threat of violence, both cases involved relatively small amounts of money, and both cases involved crimes society views as among the less serious offenses. In addition, he claims, given his age and life expectancy, the sentence he received - 50 years to life with a minimum of 50 years before parole eligibility - is the functional equivalent of the life without parole sentence the defendant in *Solem* received.

As to *Rummel*, Andrade maintains the principal feature that distinguishes that case from the instant matter is that in *Rummel*, although the defendant received a life sentence, Texas had a liberal parole policy which meant Rummel would

be eligible for parole in twelve years. *See, Rummel*, 445 U.S. at 280-81; *see, Solem*, 463 U.S. at 297.

As to *Harmelin*, Andrade argues there are two features distinguishing that case from the instant matter. First, Andrade argues, his crimes of petty theft with a prior did not pose the grave risk of harm to society that Harmelin's possession of enough cocaine to potentially yield 32,500 to 65,000 doses did, yet he received essentially the same sentence. Second, citing Justice Kennedy's observation in *Harmelin* that the Michigan law involved there provided clear notice of the consequences of possession of drugs, Andrade argues the sentencing scheme in the instant matter did not provide clear notice to him, and the complexity of the scheme obscured the possible sanctions for the crime. In support of his argument he notes that at the time of his offenses no published case had held a defendant could get two strikes from a single past case, that the California Supreme Court had not settled the question of whether consecutive sentences are required for multiple current offenses, and that it had not yet been determined how much of a 25-year to life sentence a convicted defendant would have to serve before being eligible for parole. Resp's. Brief, at 17-18, fn. 4. Third, relying on the fact that, in *Harmelin*, seven justices endorsed the principle that grossly disproportionate sentences are unconstitutional, Andrade engages in intra-jurisdictional and inter-jurisdictional comparisons which he claims further demonstrates his sentence is grossly disproportionate.

Andrade's arguments are without merit. Proportionality review does not apply to term-of-years sentences. Nevertheless, assuming for the sake of argument that proportionality review does apply to term-of-years sentences, in light of the general principles of such review, the instant sentence is constitutional. In addition, Andrade's arguments should be rejected because they are fundamentally flawed in that the instant matter is distinguishable from *Solem* and *Atkins*, and is most similar to *Rummel*, where this Court rejected a challenge to the proportionality of a term-of-years sentence.

A. Proportionality Review Should Not Apply To Term-Of-Years Sentences, And If It Does, The Fundamentl Principles Of Review Render The Instant Sentence Constitutional

First, it must be recognized that Andrade's sentence is entitled to increased deference because it involves a sentence mandated by the state legislature rather than a trial judge's discretionary sentencing choice. Andrade's sentence is the result of a scheme narrowly tailored so as to apply only to those persons convicted of a felony and who have previously been convicted of two or more serious or violent offenses. Additionally, the scheme does not involve a life without parole sentence, but rather offers the real possibility of parole. Moreover, the scheme includes a safety valve whereby the sentencing court can exercise discretion and dismiss the prior conviction allegation(s).

Thus, the scheme is sufficiently narrowed so that no sentence within its parameters may be characterized as "grossly disproportionate" and thereby unconstitutional. Deference to the will of the People as reflected in the sentencing scheme selected by them strikes a proper balance between the People's historically broad policy making authority and the federal judiciary's limited power to override the People's power to punish crime.

Besides, Andrade's argument is based on an incorrect premise. Andrade persistently refers to his conduct as "petty theft." By doing so, Andrade tries to minimize his conduct as something less than a felony. In other words, he seems to suggest that his current misconduct is all that counts and his status as a recidivist is substantively meaningless. The People of the State of California, however, have determined that in light of the fact that Andrade was previously convicted of a theft-related offense, his current conduct may be classified as a felony. The People of the State of California, or for that matter the people of any State, have a right to conclude a defendant's prior convictions demonstrate the instant conviction evidences

such a persistent refusal to remain law-abiding that it may properly be classified as a felony.[1]

In any event, proportionality review should not apply to term-of-years sentences in the first place, because to do so requires a deviation from the fundamental principle that proportionality analysis should be based on objective factors to the maximum extent possible. As this Court noted in *Hutto v. Davis*, 454 U.S. 370, 373, 102 S.Ct. 703, 70 L. Ed. 2d 556 (1982), citing *Rummel*, 445 U.S. at 275, the excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make any constitutional distinction between one term of years and another.[2]

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1. Moreover, Andrade's chronic reference to his crimes as "petty theft" seems to ignore the fact that "petty with a prior" is not the only such crime which could result in a third-strike sentence. For example, in California possession of a concealed firearm without a permit is a wobbler, i.e., punishable as either a misdemeanor or a felony. Calif. Pen. Code, §§ 12020(a)(1) and 12020(b)(8). Nevertheless, possession of a firearm by a person who has been previously convicted of a felony is a felony. Calif. Pen. Code, § 12021(a)(1). Thus, a defendant previously convicted of two burglaries and currently convicted of possession of a firearm would be subject to the same sentencing as Andrade.

2. Citing *Solem*, 463 U.S. at 289, Andrade argues it is anomalous to find excessive fines and the death penalty subject to proportionality analysis yet not do so with regard to prison terms. Resp's. Brief, at 12, fn. 2. But the framers of the Constitution were well aware of the concept of requiring a sentence to be proportionate to the nature of an offense, yet chose not to expressly include that requirement in the Bill of Rights. *See, Harmelin*, 501 U.S., at 977-78 (Scalia, J, dissenting.).

B. Andrade's Attempts To Rely On *Solem* And *Atkins*, And Distinguish *Rummel* And *Harmelin*, Are Flawed

Andrade's arguments must also be rejected because they are substantially flawed in a number of respects. First, his reliance on *Solem* is misplaced. The value of the property in question is hardly decisive. The significant factors in *Solem* were that the crime was indisputably passive, i.e., uttering a no-account check, the defendant's prior offenses were all relatively minor, i.e., three third-degree burglary convictions, obtaining money under false pretenses, larceny, and a third-offense driving while intoxicated, and the sentence was life without the possibility of parole.

Here, conversely, Andrade's crimes were not passive; they were active, involving the theft of property from the direct possession of the rightful owners. In addition, his prior offenses, including three first-degree burglary convictions for residential burglary, are serious, both factually and legally. Finally, Andrade's sentence provides for the possibility of parole. The argument that he might not live long enough to see that day is entirely speculative and eccentric to this offender.

As to *Harmelin*, Andrade's reasoning gives little, if any, weight to the fact that the sentence there was life without the possibility of parole. Here, however, parole is available.

Moreover, Justice Kennedy's comments, concerning the clarity of the notice the Michigan sentencing scheme provided, were addressed to a challenge to the mandatory nature of the scheme, and in support of his ultimate conclusion that the Michigan scheme was as fair, if not more so, than schemes in which the sentencing authority's discretion, or the complexity of the scheme, obscured the possible consequences. The mandatory nature of California's scheme is not an issue here. Moreover, as Justice Kennedy noted, this Court has never invalidated a legislatively-mandated penalty based solely on the length of sentence, and that the arguments for or against particular sentencing schemes are for legislatures to resolve.

Id., 501 U.S. at 1001-1007. Regarding individualized sentencing, Justice Kennedy further noted the Michigan scheme provided mechanisms for consideration of individualized circumstances, and that prosecutorial discretion before sentencing, as well as legislative and executive clemency procedures afterwards, provided means by which the state could avert or correct unjust sentences. *Id.*, at 1008. Similar mechanisms exist in California's scheme.

In any event, Andrade presumes the "narrow proportionality principle" Justice Kennedy referred to applies to a term of years sentence. The reference, however, is easily understood as applying only to capital cases and sentences of life without the possibility of parole. In fact, this inference is more reasonable in light of *Rummel*, as well as Justice Kennedy's observation that this Court has never invalidated a legislatively mandated penalty solely on the basis of the length of sentence. *Harmelin*, 501 U.S. at 1006-1007.

Thus, although the facts of this case bear some resemblance to both *Rummel* and *Solem*, it is most similar to *Rummel*. And in the *Solem* opinion, this Court said *Rummel* controls on similar facts. *Solem*, 463 U.S. at 304. Nevertheless, Andrade tries to distinguish *Rummel* on two grounds. First, he claims the conduct in *Rummel* was felonious whereas the conduct here was misdemeanor in nature. As previoulsy discussed, however, Andrade is wrong as a matter of law. Moreover, in *Rummel*, the amount of money taken was $120.75, and the taking was accomplished by false pretenses. Here, the value of the property taken was $153, and the taking was accomplished by theft. For constitutional purposes, there is simply no meaningful difference between the conduct in the two cases.

Second, Andrade claims Texas' liberal parole policy distinguishes *Rummel* from the instant matter. But the liberal parole policy only meant Rummel would be eligible for parole in twelve years. It did not mean he would necessarily receive parole. Moreover, if Andrade had committed only the same

number of offenses as Rummel did (one), he would have been eligible for parole in 25 years. In other words, Andrade's sentence appears more onerous because his conduct was more onerous. Finally, Andrade cites no authority (and Petitioner can find none), supporting the proposition that Andrade's Constitutional rights were violated by a sentencing scheme which limits parole eligibility in the manner chosen by the People of the State of California. As compared with *Rummel*, there simply is no Constitutional defect in the sentence in this case.

In addition, Andrade's intra-jurisdictional and inter jurisdictional comparisons are flawed. On an intra-jurisdictional basis, Andrade compares his sentence to the sentence a first time offender would receive in California were he convicted of two counts of petty theft with a prior. Resp's. Brief, at 18-20. The correct intra-jurisdictional comparison, however, is not between recidivists and non-recidivists who commit the same offense, but rather between the sentence imposed for the subject offense and sentences imposed on other criminals for different offenses. *Solem*, 463 U.S. at 292-294. And, as demonstrated in Petitioner's opening brief, that proper comparison suggests Andrade's sentence is not at all disparate. Petr's. Brief on the Merits, at 20-21.

Moreover, in support of his intra-jurisdictional comparison, Andrade argues that if his prior convictions had been for violent crimes, such as murder or manslaughter, the maximum punishment he could have received for the instant offenses would have been one year in prison, because there were no prior theft-related offenses. Resp's. Brief, at 19. Andrade's point is irrelevant. His prior theft-related crime rendered the instant offense a felony, and Andrade had notice of that rule of law. Therefore, the potential sentence he might have received had his instant offenses been misdemeanors has no bearing on the proper comparison between his sentence and the sentences other defendants would receive for different felony offenses.

Andrade's inter-jurisdictional comparison also is based on an incorrect factual predicate. Citing *Riggs v. California*, 525 U.S. 1114 (1999), Andrade claims California is the only state in which a misdemeanor offender could receive such harsh punishment. Resp's. Brief, at 20. But Andrade did not commit a misdemeanor, he committed a felony. Characterizing Andrade's offense as a misdemeanor ignores the California Legislature's plenary authority to define what constitutes a felony in California.

Andrade's argument also ignores Justice Holmes' caveat in his dissenting opinion in *Lochner v. New York*, 198 U.S. 45, 76, 25 S.Ct. 539, 49 L. Ed. 937 (1905), that in a federal system, absent a constitutionally imposed uniformity contrary to traditional concepts of federalism, one state will inevitably treat particular offenders more severely than all other states do. *See, People v. Mantanez*, 98 Cal.App.4th 354, 365 (2002) (federalism only extends to those within the extremes, and the extremes are automatically suspect). And accepting Respondent's reasoning would be tantamount to judicially imposed federal sentencing mandate compelling uniformity and a constant downward trend in sentence length.

Andrade also invokes this Court's recent decision in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002). Andrade notes that in *Atkins*, this Court emphasized the fact that because a majority of states prohibit the execution of retarded persons, there is a consensus that such punishments are cruel and unusual. Relating that statement to the instant matter, Andrade argues no State other than California would permit the same sentence imposed here. Resp's. Brief, at 21-23. Andrade seems to be implying that except for California, there is a consensus among the States that sentences such as the one Andrade received are grossly disproportionate. Andrade's point ignores the fact that four other states have schemes reasonably similar to California's. It also ignores the fact that in *Atkins*, this Court relied on a trend it found had been emerging since approximately 1990. *Atkins*, 122 S.Ct., at 2248-50. There is no

similar emerging trend regarding recidivist sentencing. In fact, the opposite is true.

In support of his general assertion that proportionality review applies to term-of-years sentences (Resp's. Brief, at 14), Andrade also relies on the *Atkins* opinion's acknowledgment that the Eighth Amendment draws its meaning from the evolving standards of decency which mark the progress of a maturing society, and that the clearest and most reliable evidence of contemporary values is legislation enacted by the country's legislatures. *See Atkins*, 122 S.Ct. at 2247. But this Court has applied the "evolving standards" test to the methods of punishment, not to the length of a particular sentence. Moreover, society's sense of decency will inevitably be influenced by contemporary events. Thus, Petitioner respectfully submits, Andrade's argument should be rejected because the "evolving standards" test provides no useful basis for analyzing the proportionality of a term-of-years sentence.

Citing empirical studies concerning the effects of California's three-strikes law, Andrade further claims that Petitioner offers no evidence that punishing shoplifting with life sentences serves a rational purpose. Resp's. Brief, at 28-29. Andrade misses the point. Petitioner is not required to substantiate the purpose of the Three-Strikes law with empirical evidence in order for Andrade's sentence to be held constitutional. Substantiating the purpose of the law is the domain of the legislature in debating policy issues. Petitioner's opening brief on the merits only discussed the rational purpose behind the law in order to explain why the California Legislature, as well as the citizens of California, thought the law was necessary in the first place.

In any event, the rationality of the law cannot be confined to the question of whether imposing life sentences on shoplifters is rational or not, because that is not what happened here; more is involved. Andrade is a recidivist who has committed serious offenses. Thus, the proper analysis goes to the question of whether imposing life sentences on career

criminals is rational or not. And, in addressing that question, judicial deference should be at its apex. It is difficult enough to evaluate the proportionality of a sentence when one crime is at issue. If the instant crime is aggravated by prior offenses, however, and those priors indicate a resistance to rehabilitation, greater moral culpability, and a greater risk to community, reviewing courts are being asked to make decisions virtually indistinguishable from the legislature's policy making.

Moreover, implicit in Andrade's argument is a claim that only another serious or violent felony should result in a life sentence. Such an argument inherently concedes such a sentencing scheme would be rational. But the choice of the People in prescribing that any felony is enough to warrant a life sentence is no less rational; it is just not to Andrade's liking.

Andrade makes another point which Petitioner submits is flawed. In a sort of alarmist fashion, he argues that what California has done is tantamount to making overtime parking punishable by life imprisonment. Resp's. Brief, at 24. Andrade is incorrect. His assertion ignores his felony recidivism. Besides, it goes without saying that overtime parking constitutes an inconvenience on society, whereas serial theft by a person known to have committed serious felonies poses real burdens and risks.

Andrade's overall reasoning should be rejected on an additional basis. If endorsed, it would mean subjective, rather than objective, factors would form the basis for proportionality analysis in terms of years cases. A state will be precluded from incapacitating any defendant whose sentence exceeded his life expectancy unless the subject offenses comport with the reviewing court's subjective opinion as to the seriousness of the offense. At some point, however, a state must be able to isolate an habitual criminal from society for long periods of time. There is nothing constitutionally significant about a third felony offense. California could just as easily have drawn the line at a second offense, or a fifteenth. Andrade's criminal history clearly reveals he will chronically reoffend. What greater

evidence could there be of Andrade's chronic criminalism, and the associated burden his incorrigibility places on society, than the fact that he was arrested, released, and two weeks later he offended again. If Andrade's reasoning were accepted, however, California would be precluded from incapacitating him, or others like him, after a tenth, or a fifteenth, or a twentieth petty with a prior, despite the fact that the offenders have demonstrated they are chronic felons who will commit serious offenses and are unwilling to remain law-abiding. A reviewing court might subjectively determine the triggering offense is not serious enough, or the criminal history is not serious enough, or the defendant is too old, or the defendant is in too poor a state of health, to merit the punishment prescribed by law. Such reasoning provides no objective basis for conducting a sentencing scheme.

Finally, Andrade rejects Petitioner's proposed test, of limiting the "exceedingly rare" instances of unconstitutional sentences in non-capital and non-life-without-parole cases to those not susceptible to debate among reasonable minds. Andrade argues such a test is contrary to this Court's holding *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L. Ed. 2d 389 (2000), provides no limiting principle, and would replace the three-part test of *Solem*. Andrade's argument is incorrect in all respects.

First, as Justice Kennedy explained in *Harmelin*, there is no three-part test. *Solem* provides a one-part test which may be validated by other considerations.

Second, Petitioner's proposal is not contrary to *Williams*. In *Williams*, this Court rejected an all reasonable jurists test for federal habeas review of the reasonableness of a state court's merits determination, because it would have established a unanimity requirement, and a subjective, rather than objective, standard for reasonableness.[3] *Williams*, 529

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3. Andrade doubts any reasonable person would believe

U.S. at 377-78, 409-10. But that is a different standard than a "not susceptible to debate" standard. Indeed, although this Court rejected an "all reasonable jurists" test in *Williams*, in *O'Dell v. Netherland*, 521 U.S. 151, 156, 117 S.Ct. 1969, 138 L. Ed. 2d 351 (1997), this Court essentially endorsed the test as a standard of objective reasonableness. *See, Butler v. McKellar*, 494 U.S. 407, 415, 110 S.Ct. 1212, 108 L. Ed. 2d 307 (1990) (stating test articulated in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L. Ed. 2d 334 (1989), is whether a rule is susceptible to debate among reasonable minds).

Finally, the proposed test does provide a limiting principle. As this Court noted in *Williams*, although the term "unreasonable" is difficult to define, it is a common legal term and federal judges are familiar with its meaning. *Williams*, 529 U.S. at 365.

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an indeterminate life term, with no parole for 50 years, is anything other than grossly disproportionate when imposed for shoplifting videotapes. Resp's. Brief, at 31. The dissent in *Andrade v. Attorney General of the State of California*, 270 F.3d 743 (2001) and the majority in *People v. Mantanez*, 98 Cal.App.4th, at 354, disagree.

II.

THE STATE COURT'S MERITS DETERMINATION DID NOT INVOLVE AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT

In the opening brief on the merits, Petitioner argued Andrade was not entitled to federal habeas relief because the State court's merits determination did not involve an unreasonable application of this Court's clearly established precedent. In response, Andrade argues the State court decision was both contrary to, and involved an unreasonable application of, this Court's clearly established precedent.

As to the "contrary to" prong, Andrade argues this Court's decisions clearly establish the constitutionality of his sentence should be determined using the *Solem/Harmelin* framework. He maintains that because the State court opinion questioned whether proportionality analysis even applied, the State court essentially disregarded the test prescribed in *Solem* and *Harmelin*, and applied only *Rummel*, and therefore the State decision was contrary to this Court's precedent. Resp's. Brief, at 33-37.

As to the "unreasonable application" prong, Andrade says a 50-years-to-life sentence is clearly grossly disproportionate, and therefore the State court determination upholding the sentence unreasonably applied federal law. Resp's. Brief, at 37-38. Andrade further argues that Petitioner's proposal as to how to define the term "objectively unreasonable," is identical to the definition rejected in *Williams*. Resp's. Brief, at 32-39.

Andrade's arguments must be rejected for several reasons. First, Andrade's assertion, that this Court's decisions clearly established his sentence had to be analyzed using the *Solem/Harmelin* framework, is incorrect. *Solem* and *Harmelin*

involved life without parole sentences, whereas the instant matter and *Rummel* involved indeterminate life sentences, and *Solem* said *Rummel* controls in similar factual situations. Therefore, it was unclear whether the *Solem* test, as refined by *Harmelin*, applied at all in this case.

Second, the application of the Eighth Amendment to non-capital cases, particularly those involving non-violent triggering offenses resulting in life sentences, is anything but clear. Whether federal law is clearly established for § 2254 purposes depends on whether a rule is dictated by precedent at the time the defendant's conviction became final. In other words, does a survey of the existing legal landscape show reasonable jurists might differ on the outcome? If so, the rule was not clearly established. *See, Williams*, 529 U.S. at 381.

In this Court's proportionality analysis cases, however, *Rummel* reached one conclusion while *Solem* reached another. Moreover, writing in dissent, Chief Justice Burger said *Solem* could not be rationally reconciled with *Rummel* (*see, Solem*, 463 U.S. at 304 (Burger, C.J., dissenting). Further, in *Harmelin* the lack of clarity was more evident. Justice Scalia observed *Solem* was not an expression of clear law (*Harmelin*, 501 U.S. at 965), and Justice Kennedy commented that this Court's proportionality decisions have not been entirely clear or consistent. *Id.*, at 996-98. In addition, Justice Kennedy noted this Court has never invalidated a legislatively mandated sentence based on the length of sentence alone. *Id.*, at 1006-07.

Third, the State court did not disregard *Solem* and *Harmelin*. It simply noted that another division of the same court had questioned *Solem's* continued validity. The State court then found the instant case to be most similar to *Rummel*, but was silent as to whether that finding was based on the life without parole versus term of years distinction, or some other basis. App. E, to Pet for Writ of Certiorari, at 76-77.

As to the "unreasonable application" prong, Andrade argues a 50-years to life sentence is clearly disproportionate, and therefore the State court's determination upholding the

sentence unreasonably applied federal law. Resp's. Brief at 37-38. But Andrade's reasoning is circular, i.e., he justifies his conclusion by arguing it is an indisputable premise. Moreover, apart from the fact that such circular reasoning is fundamentally flawed, his conclusion is based on a faulty premise. There is obvious disagreement among reasonable minds regarding the proportionality of Andrade's sentence. *See, Andrade v. Attorney Gen. of the State of California*, 270 F.3d at 767-772 (Sneed, J., dissenting); *see, People v. Mantanez*, 98 Cal.App.4th at 363-64.

In any event, as was argued in Petitioner's Brief on the Merits, in evaluating the reasonableness of a state court's merits determination, federal habeas courts do not concern themselves with the intricacies of the state court's reasoning; the only question is whether the state court decision was objectively unreasonable. State courts are not required to use particular language in order to avoid being held to have rendered an unreasonable decision. Petr's. Brief on the Merits, at 30.

In response to Petitioner's proposed definition for what constitutes an objectively unreasonable decision, Andrade again asserts the "susceptible to debate" standard is virtually identical to the "all reasonable jurists" standard rejected in *Williams*. Andrade is incorrect. An "all reasonable jurists" test constitutes a unanimity requirement permitting the views of one judge to have greater weight than the considered judgment of several others. *See, Williams*, 529 U.S. at 377-78. A "susceptible to debate" standard, on the other hand, requires the reviewing court to engage in a process it routinely engages in, i.e., evaluating reasonableness.

Finally, Andrade ignores the fact that the standard of review used by the Ninth Circuit in determining the State court decision was unreasonable, fails to address the reasonableness of the State court's decision and thwarts Congress' purpose in enacting habeas corpus reform. For the reasons previously discussed, Petitioner

urges this Court to establish a workable definition, and to do so by analogy to *Teague*.

Dated: September 5, 2002

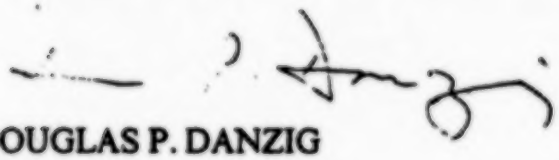
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IN THE

Supreme Court of the United States

BILL LOCKYER, Attorney General of the State of California;
ERNST B. ROE, Warden,

Petitioners,

vs.

LEANDRO ANDRADE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CRIMINAL JUSTICE LEGAL FOUNDATION; HONORABLE BILL JONES, SECRETARY OF STATE OF CALIFORNIA; CALIFORNIA STATE SENATORS DICK ACKERMAN, JIM BATTIN, JIM BRULTE, RAY HAYNES, ROSS JOHNSON, BRUCE McPHERSON, DICK MONTIETH; AND CALIFORNIA STATE ASSEMBLYMAN DENNIS HOLLINGSWORTH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. What, if any, law is "clearly established" by Supreme Court precedent with respect to Eighth Amendment challenges to the proportionality of prison sentences?

2. Was the state court's application of the relevant body of law to the defendant's challenge to his sentence so arbitrary as to exist outside the universe of plausible outcomes and therefore unreasonable under 28 U. S. C. § 2254(d)?

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IN THE

Supreme Court of the United States

BILL LOCKYER, Attorney General of the State of California;
ERNST B. ROE, Warden,

Petitioners,

vs.

LEANDRO ANDRADE,

Respondent.

BRIEF OF THE CRIMINAL JUSTICE LEGAL FOUNDATION, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's attack on California's "three strikes" law is an unwarranted expansion of habeas review which cripples an important recidivist sentencing scheme, and is thus

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

contrary to the interest of victims and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The prisoner, Leandro Andrade, was convicted in a California court of two counts of petty theft. Cal. Penal Code §§ 484, 487. See *Andrade* v. *Roe*, 270 F. 3d 743, 749 (CA9 2001). Petty theft is a misdemeanor, see Cal. Penal Code § 490, but if the defendant was previously convicted of and served a term for burglary or other specified crimes, then the theft may be treated as either a misdemeanor or a felony. See Cal. Penal Code § 666. Because the prisoner had three prior residential burglary convictions, his thefts were enhanced to felonies. See *Andrade*, *supra*, at 749. Andrade also had prior convictions for misdemeanor theft in 1982, a federal felony transportation of marijuana offense in 1988, a state petty theft offense in 1990, and a 1991 parole violation for escape from federal prison. *Id.*, at 748-749. California law classifies residential burglary as a serious felony, see Cal. Penal Code § 1192.7(c)(18), making Andrade subject to California's "three strikes" law. See Cal. Penal Code § 1170.12(b)(1). Under the three strikes statute, Andrade received two consecutive 25-years-to-life sentences for his two felony theft convictions. See *Andrade*, *supra*, at 749.

A California Court of Appeal affirmed Andrade's conviction, rejecting an Eighth Amendment attack on his sentence in an unpublished opinion issued on May 13, 1997. App. to Pet. for Cert. 69. Relying on the California precedent, the Court of Appeal applied a three-part test that is almost identical to the test utilized in *Solem* v. *Helm*, 463 U. S. 277 (1983). Compare App. to Pet. for Cert. 77, with *Solem*, *supra*, at 292. The California Supreme Court denied the prisoner's petition for review on July 23, 1997. App. to Pet. for Cert. 81. Andrade filed a *pro se* habeas petition in the federal District Court for the Central District of California attacking his sentence on Eighth

Amendment grounds. The District Court denied the petition and subsequently denied Andrade a certificate of appealability. See *id.*, at 67.

The Ninth Circuit Court of Appeals granted Andrade a certificate of appealability and appointed counsel. See *Andrade*, 270 F. 3d, at 750. The Court of Appeals reversed the District Court, finding that Andrade's sentence was disproportionate to his crime in violation of the Eighth Amendment, and that the California Court of Appeal's decision disregarded the three-part test of *Solem*, *supra*, making it an unreasonable application of Supreme Court precedent and therefore not subject to the deferential review standards of 28 U. S. C. § 2254(d)(1). See *id.*, at 766-767. This Court granted California's certiorari petition on April 1, 2002.

SUMMARY OF ARGUMENT

Federal courts should address the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") issues before assessing the correctness of the state court decision. This Court has implicitly followed this practice in *Penry* v. *Johnson*, 532 U. S. 782 (2001) and *Bell* v. *Cone*, 535 U. S. __ (No. 01-400, May 28, 2002). This Court should now make its practice an express rule.

The present case differs from the Court's prior AEDPA cases because there are few clearly established principles in the unsettled body of law governing Eighth Amendment attacks on prison sentences. While the relevant decisions generally establish a deferential standard for reviewing sentences, there is a continuing conflict between two of the leading precedents in this area, *Rummel* v. *Estelle*, 445 U. S. 263 (1980) and *Solem* v. *Helm*, 463 U. S. 277 (1983). *Rummel* established a very deferential standard for reviewing proportionality claims against prison sentences. Although it indicated that some extraordinarily harsh sentences may not pass constitutional muster, such cases were necessarily rare.

Although *Solem* proclaimed to be similarly deferential, the execution of that standard differed significantly from *Rummel*. The second and third parts of its three-part proportionality test cannot be reconciled with *Rummel*. The *Solem* Court also demonstrated a willingness to draw conclusions based upon sentencing philosophy that was anathema to the deference to legislative policy decisions in *Rummel*.

Harmelin v. *Michigan*, 501 U. S. 957 (1991) did not end the confusion. As a split opinion, it is a weak candidate for clarifying the law, although Justice Kennedy's narrower concurrence can be seen as the controlling precedent. That opinion does not conclusively resolve the conflict between *Solem* and *Rummel*, but does move the law more towards *Rummel*'s broadly deferential standard. It does not attempt to provide adequate guidance for how to determine when a sentence is disproportionate because this area of the law is not amenable to such standards.

The treatment of proportionality challenges in other jurisdictions reflects the unsettled state of the law, as many state and federal courts decry the lack of standards in this field. Since *Harmelin*, some courts now claim that *Solem* has been overruled, and many more claim that it has been weakened. Under these circumstances, there is broad room for reasonable disagreement.

The state court did not fail to apply the proper precedent. It applied a California constitutional standard that is the equivalent of *Solem*'s three-part test. Since Andrade's sentence is less severe and his culpability greater than the defendant in *Solem*, his case is not materially indistinguishable from *Solem*. Therefore, the state court satisfied the clearly established portion of 28 U. S. C. § 2254(d).

The California court's rejection of Andrade's proportionality claim was a reasonable application of the little clearly established law there is in this area. The Ninth Circuit applied a clear error standard to assess the reasonableness of the state

court decision. A better approach is to focus on finding reasons to support the state court decision, rather than assessing its alleged error. The decision to uphold Andrade's sentence is reasonable under this approach.

If this Court decides that the three strikes law is unconstitutional in *Ewing* v. *California*, No. 01-6978, the rejection of Andrade's federal habeas claim will not prevent him from getting relief in the California courts. California allows successive habeas petitions to raise claims made retroactive to final judgments. Since Andrade's claim would be retroactive under the first exception to *Teague* v. *Lane*, 489 U. S. 288 (1989) and under California's more generous retroactivity rule, he would be able to have his day in court.

ARGUMENT

I. The AEDPA issue should be resolved first, as a "threshold matter."

Ninth Circuit precedent takes a backwards approach to federal habeas review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Van Tran* v. *Lindsey*, 212 F. 3d 1143 (CA9 2000), held that a federal habeas court should "first determine whether the state court's decision was erroneous prior to considering whether it was contrary to or involved an unreasonable application of the law under the AEDPA . . . ." *Id.*, at 1155.

Amicus CJLF has previously argued that the AEDPA issue should be addressed first, and adopts those arguments in this case. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Cone*, No. 01-400, pp. 8-14; Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Penry* v. *Johnson*, No. 00-6677, pp. 3-9.[2] This Court addresses the AEDPA issues first in its habeas cases. In *Penry* v. *Johnson*,

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2. These briefs are available on our Web site, www.cjlf.org/briefs/briefmain.htm.

532 U. S. 782 (2001), this Court declined to decide "the merits of Penry's Fifth Amendment claim. Rather, the question is whether the Texas court's decision was contrary to or an unreasonable application of our precedent." *Id.*, at 794-795. In *Bell* v. *Cone*, 535 U. S. __ (No. 01-400, May 28, 2002), this Court again determined that the state court decision was "reasonable" without deciding whether it was correct. See *id.* (slip op., at 12, 14-15). What is implicit in *Penry* and *Bell* should be made explicit. As soon as a court determines that the moving party is not entitled to the relief he seeks, the court can and should stop, both for efficiency and to avoid rendering advisory opinions. Cf. *Teague* v. *Lane*, 489 U. S. 288, 316 (1989) (plurality opinion).

When confronted with the murky area of disproportionality challenges to prison sentences, the California Court of Appeal recognized the few clearly established legal principles in this field and applied them reasonably. The inquiry should begin and end there. The Ninth Circuit's attempt to edify the California courts was unnecessary and deflected it from the proper analytical path.

II. The California court correctly identified and applied the few clearly established principles in an unsettled body of law.

In this Court's previous applications of the "clearly established" portion of 28 U. S. C. § 2254(d), identification of the controlling precedent was straightforward. In *Williams* v. *Taylor*, 529 U. S. 362 (2000), the landmark decision of *Strickland* v. *Washington*, 466 U. S. 668 (1984) was easily identifiable as the relevant, clearly established Supreme Court precedent. See *Williams*, *supra*, at 390-391; *id.*, at 413-414 (O'Connor, J., concurring). In *Penry* v. *Johnson*, 532 U. S. 782 (2001), analysis of Penry's Fifth Amendment claim centered on whether *Estelle* v. *Smith*, 451 U. S. 454 (1981) could be distinguished, see *Penry*, *supra*, at 793-795, while his Eighth

Amendment claim centered on Texas' compliance with the first *Penry* case, *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). See *Penry* v. *Johnson*, 532 U. S., at 786.

This case raises difficult issues regarding what is clearly established under § 2254(d). An examination of this Court's cases governing the proportionality of prison sentences under the Eighth Amendment uncovers a body of law that is considerably less settled than those that confronted the *Williams* and *Penry* courts. Under these difficult circumstances, the California Court of Appeal cannot be said to be contrary to the clearly established Supreme Court precedent that is in this field.

A. The Unsettled Law.

An understanding of the unsettled body of law governing Eighth Amendment attacks on the proportionality of prison sentences requires a brief survey of the cases in this field. Some assert that precedent for an Eighth Amendment proportionality requirement traces back to *Weems* v. *United States*, 217 U. S. 349 (1910). See *Harmelin* v. *Michigan*, 501 U. S. 957, 1012 (1991) (White, J., dissenting). Although historically interesting, *Weems*' unusual set of facts seriously limits its relevance to modern prison sentences. The relevant precedent is much more recent, a quartet of cases beginning with *Rummel* v. *Estelle*, 445 U. S. 263 (1980).

1. Rummel.

Rummel addressed a life sentence for a comparatively minor theft under Texas' recidivist scheme. See *id.*, at 264-265. In upholding the sentence, this Court established that while prison sentences might be subject to Eighth Amendment proportionality review, the standard of review was very deferential. It noted that "[t]his Court has on occasion stated that the Eighth Amendment prohibits its imposition of a sentence that is grossly disproportionate to the severity of the crime." *Id.*, at 271. The largest source of such precedent came from capital cases, which were readily distinguished "[b]ecause a sentence

of death differs in kind from any sentence of imprisonment . . . ." Noncapital cases raising successful proportionality claims were "exceedingly rare." *Ibid.* *Weems*, the most notable example, was limited to its "peculiar facts," including the harsh and alien *cadena temporal*. See *id.*, at 274. The *Rummel* Court concluded that "one could argue, without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative." *Ibid.*

This Court recognized a narrow exception to its deferential rule. "This is not to say that a proportionality principle does not come into play in the extreme example mentioned by the dissent, *post*, at 288, if a legislature made overtime parking a felony punishable by life imprisonment." *Id.*, at 274, n. 11. It addressed proportionality in such narrow terms because

> "a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal would be difficult to square with the view expressed in *Coker* [v. *Georgia*, 433 U. S. 584 (1977)] that the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices." *Id.*, at 275.

Rummel was convicted of obtaining $120.75 by false pretenses, a felony. See *id.*, at 266. He also had prior felony convictions for $80 in credit card fraud and forging a $28.36 check. See *id.*, at 265. Under Texas law the two prior felony convictions elevated Rummel's sentence to life. See *id.*, at 264. The Court dismissed Rummel's attempt to use the small amounts stolen and his lack of violence as objective examples of disproportionality. It held that drawing such distinctions "are indeed 'subjective' and therefore properly within the province of legislatures, not courts." *Id.*, at 275-276. Other attempts by Rummel to distinguish his case from this Court's nearly total deference to sentencing statutes were similarly unsuccessful. See *id.*, at 280-282. Therefore, Texas' mandatory life sentence for Rummel's minor theft was upheld. See *id.*, at 285.

2. Hutto.

Hutto v. *Davis*, 454 U. S. 370 (1982) (*per curiam*) reinforced *Rummel*'s deference to the legislative prerogative to define crimes and set punishments. The Court addressed a Fourth Circuit decision holding that a 40-year sentence for possession of less than nine ounces of marijuana was cruel and unusual punishment. See *id.*, at 371. The Fourth Circuit was reversed in unusually harsh language.

> "[T]he Court of Appeals sanctioned an intrusion into the basic linedrawing process that is 'properly within the province of legislatures, not courts.' More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. . . . But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Id.*, at 374-375 (citation omitted) (quoting *Rummel*, 445 U. S., at 275-276).

In other words, this Court meant what it said in *Rummel*. A proportionality challenge to a prison sentence was next to impossible. Barring the extreme example of life for overtime parking, see *Rummel*, 445 U. S., at 274, n. 11, prison sentences were likely to survive an Eighth Amendment attack.

3. Solem.

Solem v. *Helm*, 463 U. S. 277 (1983) addressed whether life without the possibility of parole was an unconstitutionally disproportionate punishment for Helm's seventh nonviolent felony conviction. See *id.*, at 279. Helm's prior felony convictions were three third-degree burglaries, theft by false

pretenses, grand larceny, and third-offense driving under the influence. See *id.*, at 279-280. His current conviction was for "uttering a 'no account' check for $100." *Id.*, at 281. The *Solem* Court began its analysis with the history of the prohibition against cruel and unusual punishment. It found that a proportionality requirement was "deeply rooted and frequently repeated in common-law jurisprudence." *Id.*, at 284. Proportionality had been recognized "in this Court for almost a century." *Id.*, at 286. Therefore it rejected the state's contention that proportionality did not apply to felony prison sentences. *Id.*, at 289. While courts must be deferential to legislative sentencing policies, "no penalty is *per se* constitutional." *Id.*, at 290.

Solem took an objective approach to proportionality review. It applied a three-part test, examining "i) the gravity of the offense and the harshness of the penalty; ii) the sentences imposed on other criminals in the same jurisdiction; and iii) the sentences imposed for the commission of the same crime in other jurisdictions." *Id.*, at 292. Applying this test the *Solem* Court found that Helm's sentence violated the Eighth Amendment's proportionality requirement. See *id.*, at 303.

Its holding that this punishment violated the Eighth Amendment is difficult to square with *Rummel* and *Hutto*. It is true that the facts of *Solem* do differ from *Rummel*. *Solem* involved a potentially harsher punishment, as the life sentence in *Rummel* was mitigated by the possibility of parole within 12 years. See *id.*, at 297. Yet this would seem to have made little difference to the *Rummel* Court. The *Rummel* decision accorded nearly complete deference to prison sentences. See, *ante*, at 8. While the *Rummel* Court did note the "however slim" possibility of parole in 12 years, see 445 U. S., at 280-281, its holding did not turn on this point. *Rummel*'s discussion of the possibility of parole was a small part of a larger analysis dealing with Rummel's claim that no state would have punished him as severely as Texas. See *id.*, at 279-281. The fact that the possibility of parole ameliorated Rummel's sentence did not

support the argument's dismissal. Instead, it showed that Rummel's claim involved making subtle distinctions between gradations of crime and punishment that courts must not make. "We offer these additional considerations not as inherent flaws in Rummel's suggested interjurisdictional analysis but as illustrations of the complexities confronting any court that would attempt such a comparison." *Id.*, at 281.

Solem also contradicted the spirit of *Rummel*. Instead of *Rummel*'s declaration that prison sentences could be attacked only in the most extreme cases, the *Solem* Court warned that all sentences were subject to scrutiny. Thus, even "a single day in prison may be unconstitutional in some circumstances." *Solem*, 463 U. S., at 290. *Solem*'s three-part test is also contrary to *Rummel*. *Solem*'s first part, comparing the gravity of the offense to the severity of the penalty, see *id.*, at 290-291, was calculated differently in *Rummel*. The only sentence it explicitly recognized as disproportionate was the extreme circumstance of life for a parking offense. This conflict was made more prominent by *Solem*'s application of this standard. The Court minimized the gravity of Helm's offenses because they were not violent and involved small sums, an analysis that the *Rummel* Court flatly rejected as inherently subjective. Compare *Solem*, *supra*, at 296-297, with *Rummel*, 445 U. S., at 275-276.

The second *Solem* factor, comparison to sentences imposed on other criminals in the jurisdiction, see 463 U. S. at 291, was dismissed by *Rummel* in a footnote. See 445 U. S., at 282, n. 27. *Rummel* also thoroughly dismissed *Solem*'s third factor, comparing the sentences to sentences for similarly situated criminals in other jurisdictions. Compare *Solem*, *supra*, at 291, with *Rummel*, *supra*, at 281-282. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, *supra*, at 282.

The two decisions even disagreed on the relevance of sentencing philosophy to proportionality claims. While the

Solem Court attacked the North Dakota sentence for precluding any efforts to rehabilitate Helm, see 463 U. S., at 297, n. 22, the *Rummel* Court refused to adopt any theory of sentencing. See 445 U. S., at 283-284.

In spite of this conflict, *Solem* disclaimed any intent to overrule *Rummel*. See 463 U. S., at 303, n. 32. The *Solem* Court showed at least some affinity for *Rummel*'s analysis by reiterating that successful proportionality challenges to noncapital sentences should be " 'exceedingly rare.' " *Id.*, at 289 (quoting *Rummel*, 445 U. S., at 272). Similarly, the *Solem* Court also denied that it was creating any general authority for appellate review of sentences. Courts should still accord "substantial deference" to "legislatures and sentencing courts . . . ." *Solem*, 463 U. S., at 290, n. 16. It asserted that it merely supplied standards for reviewing Eighth Amendment proportionality claims that were absent from *Rummel*. See *id.*, at 304, n. 32. Since Helm's crimes were nonviolent and minor, and his sentence was comparatively harsh to similarly situated criminals in North Dakota and other states, his sentence was struck down for being "significantly disproportionate to his crime . . . ." *Id.*, at 303.

4. Harmelin.

The tensions underlying Eighth Amendment proportionality review of prison sentences exploded into full view in *Harmelin* v. *Michigan*, 501 U. S. 957 (1991). Harmelin was sentenced to life without the possibility of parole for possessing 672 grams of cocaine. See *id.*, at 961 (opinion of Scalia, J.). Except for rejecting an individualized sentencing requirement for noncapital sentences and upholding Harmelin's sentence, see *id.*, at 996 (majority), there was no majority opinion in this 5-4 decision.

Justice Scalia, joined by the Chief Justice, rejected Eighth Amendment proportionality review except in capital cases. See *id.*, at 994. The opinion denounced *Solem* as simply wrong and "scarcely the expression of clear and well accepted constitutional law." See *id.*, at 965. *Rummel* and *Hutto* were cited

approvingly in Justice Scalia's opinion although both cases accepted the possibility of a noncapital proportionality guarantee. See *id.*, at 962-964. Harmelin's sentence was necessarily lawful under this approach. See *id.*, at 996.

Justice Kennedy, joined by Justice O'Connor and Justice Souter, agreed that Harmelin's sentence should be upheld, but that *stare decisis* counseled against rejecting "the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years." *Id.*, at 996 (opinion of Kennedy, J.). However, this opinion recognized that it was upholding a fractured line of authority. "Although our proportionality decisions have not been clear or consistent in all respects, they can be reconciled, and they require us to uphold petitioner's sentence." *Id.*, at 996-997. After briefly surveying the Eighth Amendment proportionality cases since *Weems*, see *id.*, at 997-998, Justice Kennedy found fault with the current state of proportionality analysis in noncapital cases. "Though our decisions recognize a proportionality principle, its precise contours are unclear. This is so in part because we have applied the rule in few cases and even then to sentences of different types." *Id.*, at 998. Thus *Solem* "appeared to apply a different analysis than in *Rummel* and *Davis*" even though it purported to uphold those decisions. *Ibid.* What could be harvested from these conflicting authorities was "some common principles that give content to the uses and limits of proportionality review." *Ibid.*

These principles are very general, and lean more towards *Rummel* than *Solem*. First, "the fixing of prison terms for specific crimes involves a substantive peneological judgment that as a general matter is 'properly within the province of legislatures, not courts.' " *Ibid.* (quoting *Rummel*, 445 U. S., at 275-276). Determining the proper punishment involves difficult policy questions containing strong political and moral elements. See *ibid.* Appellate courts should not make such distinctions. This was the central theme of *Rummel*, that the

appellate courts should not second-guess these policy decisions. See *Rummel*, 445 U. S., at 279.

"The second principle is that the Eighth Amendment does not mandate adoption of any peneological theory." *Harmelin*, 501 U. S., at 999 (opinion of Kennedy, J.). Once again, this is closest to *Rummel*'s reasoning. As noted earlier, while the *Rummel* decision deferred to the peneological theories supporting Texas' recidivism statute, the *Solem* Court criticized the life without possibility of parole sentence as foreclosing any attempts at Helm's rehabilitation. See *ante*, at 10. For the third principle, that "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure," Justice Kennedy's opinion cited *Solem*. See *ibid.* This principle is also closer to *Rummel* than *Solem*. The *Rummel* Court strongly criticized interjurisdiction comparison of sentences, see *Rummel*, 445 U. S., at 281; *Harmelin*, *supra*, at 999-1000 (opinion of Kennedy, J.), and was willing to uphold a penalty even if it was the most severe in the nation for that crime. See *Rummel*, at 209-282. While the *Solem* decision acknowledged difficulties in making such comparisons, see 463 U. S., at 294-295; *Harmelin*, *supra*, at 1000 (opinion of Kennedy, J.), it still made interjurisdictional comparison a mandatory part of its three-part test. See *Solem*, *supra*, at 291-292.

The fourth principle, that proportionality review should be driven by objective factors, is derived from both *Solem* and *Rummel*. See *Harmelin*, 501 U. S., at 1000 (opinion of Kennedy, J.). The deference in *Rummel* was driven by the need to avoid substituting subjective judicial sentiments for legislative policy choices. See *Rummel*, 445 U. S., at 275. In *Solem*, the quest for objectivity led to its three-part test. See 463 U. S., at 290-291. Justice Kennedy's opinion also recognized that "we lack clear objective standards to distinguish between sentences for different terms of years" making successful proportionality challenges to prison sentences " ' "exceedingly rare." ' "

Harmelin, *supra*, at 1001 (quoting *Solem*, *supra*, at 290 (quoting *Rummel*, *supra*, at 272)).

The remaining important feature of the concurrence was the decision to forego the last two parts of the *Solem* test. *Solem* was now "understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review." *Id.*, at 1004-1005. Thus, the last two *Solem* factors would only be referred to when "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.*, at 1005.

Harmelin is a clear step back from *Solem*. Two justices voted to overrule it, while the remaining members of the majority would all but abandon two-thirds of its test. Justice Kennedy's opinion asserted it "neither 'eviscerate[s]' *Solem*, nor 'abandon[s]' its second and third factors . . . ." *Id.*, at 1005 (quoting *id.*, at 1018, 1020 (White, J., dissenting)). It did, however, represent a revival of *Rummel* and *Hutto*. See *id.*, at 1005 (opinion of Kennedy, J.) ("full account"). Given the conflict between *Solem* and *Rummel*, any return to *Rummel* is necessarily a step back from *Solem*.

This is the body of precedent that confronted the California appellate court when it addressed Andrade's Eighth Amendment claim: conflicting decisions providing comparatively little concrete guidance outside of a strong deference to noncapital sentences, and this Court stepping back from the only explicit test it had promulgated. The question is not simply whether the California court correctly identified and applied clearly established law, but rather whether there was any *clearly* established law for the court to apply?

B. Searching for Clarity.

Any attempt to find a clearly established precedent for the California court to follow begins in *Harmelin* v. *Michigan*, 501 U. S. 957 (1991). In addition to being the last word on the subject, *Harmelin* reflects the fissures and uncertainty running

through the Eighth Amendment's proportionality requirement for noncapital sentences. As a split opinion in an already conflicted body of precedent, *Harmelin* is not a strong candidate for clearly establishing any precedent. However, a handful of principles can be refined from the *Harmelin* opinion. In a fragmented opinion, the holding is taken from the opinion concurring on the narrowest grounds. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). Since Justice Kennedy's concurrence did not call for overruling any of this Court's precedents, it is the narrower of the two *Harmelin* concurrences, and therefore is *Harmelin*'s holding.

Harmelin does stand for more than deference to noncapital sentences. The reiteration of the principle that sentences must be analyzed by objective factors, see *Harmelin*, 501 U. S., at 1000 (opinion of Kennedy, J.), is not expressly deferential. But see *Rummel*, 445 U. S., at 275(extensive judicial intrusion into legislative punishment decisions threatens objectivity principle). However, the objectivity principle provides limited guidance. Justice Kennedy's concurrence reiterates the difficulty of finding any objective factors for analyzing the constitutionality of prison sentences. See *Harmelin*, *supra*, at 1001 (opinion of Kennedy, J.). Once again, this supports deferring to the constitutionality of prison sentences. The "relative lack of objective standards" makes successful Eighth Amendment attacks on prison sentences " ' "exceedingly rare." ' " *Ibid.* (quoting *Solem*, 463 U. S., at 290 (quoting *Rummel*, *supra*, at 272)).

The final principle, that the Eighth Amendment only forbids " 'grossly disproportionate' " sentences, see *ibid.* (quoting *Solem*, 463 U. S., at 288), is the culmination of the deference that is the central theme of *Harmelin*. This drove the final principle of Justice Kennedy's *Harmelin* concurrence, dispensing with *Solem*'s comparative analysis absent an inference of gross disproportionality. See *id.*, at 1005. Like the rest of Justice Kennedy's opinion, this principle is most likely to be violated by a court improperly striking down a sentence.

While Justice Kennedy's opinion instructed reviewing courts to defer to all but the grossly disproportionate sentences, it understandably provides little real guidance on how to determine when a prison sentence raises such an inference. The law is unclear in this area because there are comparatively few proportionality cases, and they address "sentences of different types." See *id.*, at 998. The analysis of Harmelin's sentence of life without possibility of parole a first-time drug offense has minimal relevance for Andrade's two consecutive 25-years-to-life sentences under a recidivist sentencing statute. This lack of ready standards means that the scope of reasonable disagreement is necessarily very broad. Therefore very few applications of these precedents can be classified as "unreasonable."

Although *Solem* and *Rummel* present closer facts, their guidance is limited. A final principle of Justice Kennedy's *Harmelin* concurrence is that the law governing Eighth Amendment attacks on prison sentences is unclear and conflicted. See *ibid.* This opinion did not resolve the conflict between *Solem* and *Rummel*, see part I A 3, *ante*, that afflicts this part of the law. The common principles it drew from these cases boil down to instruction to the appellate courts to defer to most prison sentences presented to them. While *stare decisis* kept it from accepting Justice Scalia's invitation to overrule *Solem*, see *id.*, at 996, Justice Kennedy's concurrence does represent a significant move away from *Solem* towards *Rummel*. See part I A 4, *ante*. Contrary to the Ninth Circuit's assertion, see *Andrade* v. *Roe*, 270 F. 3d 743, 766-767 (CA9 2001), *Solem* does not compel the result in this case because its exact strength as precedent is uncertain. While *Solem* may have survived *Harmelin*, it has been diminished. Precisely how diminished is not yet known.

The confused state of the law after *Harmelin* is reflected by the reaction of the state and federal courts. Many decisions in the state and lower federal courts comment on the uncertain state of the law since *Harmelin*. See, *e.g.*, *United States* v. *Sarbello*, 985 F. 2d 716, 723 (CA3 1994) ("lack of clear

directive from the Supreme Court"); *Neal* v. *Grammer*, 975 F. 2d 463, 465 (CA8 1992) ("the future of the proportionality test is uncertain"); *Hawkins* v. *Hargett*, 200 F. 3d 1279, 1281 (CA10 1999) (*Harmelin* "fractured" leaving the meaning of *Solem* "less than clear"); *McCollough* v. *Singletary*, 967 F. 2d 530, 535 (CA11 1992) (viability of *Solem* called into doubt by *Harmelin*); *State* v. *Brown*, 825 P. 2d 482, 490-491 (Idaho 1992) (*Harmelin* "fractured"); *People* v. *Gibson*, 90 Cal. App. 4th 371, 387, 108 Cal. Rptr. 2d 809, 820 (2001) (continued existence of proportionality review questionable after *Harmelin*); *State* v. *Oliver*, 745 A. 2d 1165, 1169 (NJ 2000) ("we have generally avoided entering the debate among the several members of the Supreme Court concerning the Eighth Amendment's proscription against cruel and unusual punishment"); *State* v. *Thorp*, 2 P. 3d 903, 906 (Or. App. 2000) (*Harmelin* was "severely fractured"); *State* v. *Bonner*, 577 N. W. 2d 575, 579 (SD 1998) (regretting lack of majority opinion in *Harmelin*); *State* v. *Jones*, 543 S. E. 2d 541, 545, n. 11 (SC 2001) ("questionable" whether *Solem* test still mandatory after *Harmelin*); *State* v. *Harris*, 844 S. W. 2d 601, 602 (Tenn. 1992) (precise contours of the federal proportionality guarantee unclear); *State* v. *Bacon*, 702 A. 2d 116, 122, n. 7 (Vt. 1997) (*Harmelin* is a "fractured opinion" that casts doubt on *Solem*).

The Ninth Circuit's opinion in this case reflects the confused state of the law. It casually dismissed the California Court of Appeal's decision for failing to follow clearly established law because it questioned *Solem* in light of *Harmelin*. See *Andrade*, 270 F. 3d, at 766-767. This ignores both the conflicts within this Court's precedents, see *ante*, at 10-12, and the many state and federal opinions questioning *Solem* after *Harmelin*.

Some courts have gone so far as to claim that *Solem* was effectively overruled by *Harmelin*. Not long after *Harmelin* was decided, the Fifth Circuit stated that "disproportionality survives; *Solem* does not." *McGruder* v. *Puckett*, 954 F. 2d

313, 316 (CA5 1992); see also *Smallwood* v. *Scott*, 73 F. 3d 1343, 1346, n. 4 (CA5 1996) ("*Solem* was overruled to the extent that it found in the Eighth Amendment a guarantee of proportionality); *Edwards* v. *State*, 800 So. 2d 454, 469 (Miss. 2001) (*Solem* overruled to the extent that it guaranteed proportionality"). Others have been more circumspect, concluding, as the California Court of Appeal did, that *Solem* was called into question by *Harmelin*. See, *e.g.*, *Sarbello*, 985 F. 2d, at 723; *United States* v. *Kratsas*, 45 F. 3d 63, 66 (CA4 1995) ("cast some doubt"); *McCollough*, 967 F. 2d, at 535 (viability of *Solem* called into doubt); *Brown*, 825 P. 2d, at 491-492 ("seriously erodes"); *State* v. *Lara*, 580 N. W. 2d 783, 785 (Iowa 1998) ("called into question"); *State* v. *Scott*, 961 P. 2d 667, 672 (Kan. 1998) ("discredited"); *State* v. *Lindsey*, 770 So. 2d 339, 344, n. 2 (La. 2000) ("called into question"); *State* v. *Riley*, 497 N. W. 2d 23, 26 (Neb. 1993) ("extremely doubtful" precedent). Finally, another group of courts found that *Solem* has been limited by *Harmelin*. See, *e.g.*, *United States* v. *Bucuvalas*, 970 F. 2d 937, 946 n. 15 (CA1 1992) ("significant curtailment"), overruled on other grounds in *Cleveland* v. *United States*, 531 U. S. 1218 (2000); *Hawkins*, 200 F. 3d, at 1282 ("narrows *Solem*"); *People* v. *Cooper*, 43 Cal. App. 4th 815, 820, 51 Cal. Rptr. 2d 106, 108 (1996) ("weakened substantially"); *People* v. *Hindson*, 703 N. E. 2d 956, 965 (Ill. App. 1998) ("narrowed"); *State* v. *Lee*, 841 S. W. 2d 648, 654 (Mo. 1992) ("altered"). When the California appellate court questioned *Solem*, it had plenty of company.

This is relevant to the "clearly established federal law" inquiry under § 2254(d). Although the source of clearly established law is restricted to this Court's decisions, *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000), the fact that the lower courts have difficulty in deriving a clear rule from this Court's precedents is relevant to determining whether the purported rule is clearly established. See *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994) (conflicting, reasonable views of lower courts precluded "old-rule" status under *Teague*); *Williams*, *supra*, at 412 (equivalence of *Teague* "old rule" with AEDPA "clearly

established"). If questioning *Solem* in light of *Harmelin* constitutes a failure to apply established Supreme Court precedent, then why have so many other courts followed the same path?

> A state court decision is:
>
> " 'contrary to' our clearly established precedent if the state court either 'applies a rule that contradicts the governing law set forth in our cases,' or 'confronts a set of facts that are materially indistinguishable from a decision of this court and nevertheless arrives at a result different from our precedent.' " *Penry* v. *Johnson*, 532 U. S. 782, 792 (2001) (quoting *Williams*, 529 U. S., at 405-406).

This is a matter of rule selection. Because this Court's precedents are not always clear or consistent, see, *e.g.*, *Harmelin* v. *Michigan*, 501 U. S. 957, 996-997 (1991) (opinion of Kennedy, J.); *Thompson* v. *Keohane*, 516 U. S. 99, 111 (1995), it may not be easy to discern the governing law from this Court's cases. While confusion in the lower federal and state courts is not dispositive, it is a symptom of an unclear or conflicted body of law, *i.e.*, not "clearly established."

If this Court could not agree on the proper standard for assessing proportionality challenges to prison sentences in *Harmelin*, then there can be very little "clearly established federal law" in this field. At most, appellate courts presented with proportionality attacks on prison sentences should compare the severity of the sentence to the magnitude of the crime and the defendant's criminal history to determine whether there is an inference of gross disproportionality. This determination is made with "utmost deference to the Legislature and the sentencing court." See *Bonner*, 577 N. W. 2d, at 580. If an inference of gross disproportionality is found, only then may the reviewing court turn to other objective factors. These may or may not include the *Solem* factors, or other factors not yet identified by this Court.

What is not clearly established is any particular method for comparing punishment and culpability. Because the conflict between *Rummel* and *Solem* is unresolved, neither of these different approaches can be said to clearly govern proportionality claims. While Justice Kennedy's *Harmelin* opinion provides some guidance, the life without possibility of parole sentence for a drug conviction gives *Harmelin* little relevance to Andrade's lesser sentence under a recidivism statute. Since each defendant is unique, and it is difficult to draw a line separating discrete prison sentences, see *Rummel*, 445 U. S., at 275, it may be impossible to give more concrete guidance. So long as a state court compares the culpability of the defendant's crime and criminal history to the severity of the sentence, then its decision is not contrary to any principle of federal law which has been clearly established by this Court up to this time.

The California Court of Appeal applied an independent state constitutional standard to the defendant's disproportionality claim that was almost identical to *Solem*'s three-part test.

> "A tripartite test has been established to determine whether a penalty offends the prohibition against cruel and unusual punishment. First, courts examine the nature of the offense and the offender, with particular regard to the degree of danger both present to society. Second a comparison is made of the challenged penalty with those imposed in the same jurisdiction for more serious crimes. Third, the challenged penalty is compared with those imposed for the same offense in other jurisdictions." App. to Pet. for Cert. 77 (internal quotations omitted); accord *People* v. *King*, 16 Cal. App. 4th 567, 571, 20 Cal. Rptr. 2d 220, 222 (1993); *In re Lynch*, 8 Cal. 3d 410, 425-427, 503 P. 2d 921, 930-932 (1972).

Since this standard is as favorable to the defendant as any articulated by this Court, including *Solem*, the California court did not choose the incorrect rule. Andrade's case is not "materially indistinguishable" from *Solem*. His sentence is less severe than Helm's and his culpability is greater. Therefore, the

California court at least identified and applied the proper rule. This was not a rogue state court ignoring clearly established precedent. Instead, when confronted with a confusing body of law, it applied a state constitutional standard more generous than the defendant was entitled to under this Court's cases. The state court's decision cannot be said to be "contrary to clearly established Federal law" as that phrase is interpreted in *Williams*.

III. The California court's application of what little clearly established law there is in this area was reasonable.

The Ninth Circuit's analysis of the reasonable application prong under 28 U. S. C. § 2254(d) suffers from several flaws. Its misidentification of *Solem* v. *Helm*, 463 U. S. 277 (1983) as the controlling precedent to the near exclusion of the other precedents, see *ante*, at 17, distorts its analysis of whether the California court's decision was reasonable. Also, the federal court did not properly defer to California's determination that this was the appropriate sentence for Andrade. Most importantly, the Ninth Circuit applied the wrong standard for analyzing whether a state court decision reasonably applies this Court's precedents.

The problem with the Ninth Circuit's approach to the reasonable application prong begins with the standard it applied to this test. There is no detailed test to determine when a state court's application of Supreme Court precedent is objectively unreasonable. In the cases addressing this issue, this Court simply analyzed the state court opinion and the relevant Supreme Court precedents and concluded that the state decision was either unreasonable, see *Williams* v. *Taylor*, 529 U. S. 362, 397 (2000); *Penry* v. *Johnson*, 532 U. S. 782, 803-804 (2001) (Fifth Amendment claim), or reasonable. See *id.*, at 795 (Eighth Amendment claim). *Bell* v. *Cone*, 535 U. S. __ (No. 01-400, May 28, 2002) (slip op., at 15-16). Other than informing the courts that unreasonableness must be determined objectively, and is more than mere error, see *Williams*, *supra*, at 410, this Court has given the lower federal courts little guidance in this admittedly difficult area. See *ibid.* As a consequence, the circuits have adopted their own tests for determining the reasonableness of a state court's decision. The Ninth Circuit's is far afield.

The Ninth Circuit standard for reasonableness under § 2254(d) is "clear error." Under this standard, a court first determines whether the state court decision was correct under its own interpretation of Supreme Court precedent. If it disagrees with the state court decision, it next determines whether this "error" is "clear error." "Clear error" is defined as "where the Court of Appeals is left with a 'definite and firm conviction' that an error has been committed." *Van Tran* v. *Lindsey*, 212 F. 3d 1143, 1153 (CA9 2000). If the error is labeled "clear," then the state court decision is deemed unreasonable under § 2254(d). See *id.*, at 1153-1154.

Focusing on the purported state court error starts the analysis on the wrong foot. Congress did not equate the unreasonable application standard with state court "error." See *Williams*, 529 U. S., at 410. Focusing on state court error backs away from the deference accorded to state courts under § 2254(d). It does not consider that in cases of disagreement with the lower federal courts, the state courts are very often correct and the federal courts are the ones in error. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 942 (1998). The Ninth Circuit's "approach . . . focuses on how sure the habeas court is that the state court has committed error, not whether the state court decision reveals an increment of wrongness beyond error." *Francis S.* v. *Stone*, 221 F. 3d 100, 110 (CA2 2000). The clear error standard also deflects the habeas court from addressing the AEDPA issue first. See *Bell* v. *Jarvis*, 236 F. 3d 149, 162, n. 9 (CA4 2000). This Court should provide further

guidance on how to determine when a state court decision is unreasonable.

Courts use tests in other contexts to determine whether an act is reasonable. The Fourth Amendment proscribes "unreasonable searches and seizures . . . ." U. S. Const., Amdt. 4. This Court guides efforts to assess whether a search or seizure is reasonable through a host of tests and standards. The reasonable suspicion standard helps courts and officers determine when a stop and frisk is reasonable. See *Terry* v. *Ohio*, 392 U. S. 1 (1968). Reasonableness can be detached from the Fourth Amendment's warrant requirement when the search is deemed reasonable after balancing society's interest in the search against the individuals' privacy interests. See *Vernonia School Dist. No. 47J* v. *Acton*, 515 U. S. 646, 664-665 (1995). Giving the federal courts more tools to determine when a state court decision is reasonable is consistent with the letter and the spirit of § 2254(d).

A proper standard for reasonableness must reflect the fact that genuinely unreasonable state court decisions are rare. State courts are quite willing and capable of enforcing the criminal defendant's constitutional protections, see *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976); the AEDPA is a recognition of this fact. If federal habeas courts commonly find "unreasonable" state decisions, then AEDPA's deference to state convictions evaporates.

As in *Williams*, this Court can look to the circuit courts for a standard to apply to § 2254(d). See *Williams*, 529 U. S., at 405 (partially adopting *Green* v. *French*, 143 F. 3d 865 (CA4 1998)). In *O'Brien* v. *Dubois*, 145 F. 3d 16 (CA1 1998), the First Circuit devised a useful standard for resolving reasonable application claims. "[F]or the writ to issue, the state court decision must be so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." *Id.*, at 25. Another formulation of this standard comes from the Seventh Circuit. "The statutory 'unreasonableness' standard allows the

state court's conclusion to stand if it is one of several equally plausible outcomes . . . . Some decisions will be at such tension with governing U. S. Supreme Court precedents, or so inadequately supported by the record or so arbitrary, that a writ must issue." *Hall* v. *Washington*, 106 F. 3d 742, 748-749 (CA7 1997). This standard is not foreign to this Court's analysis. It has relied on the term "plausible" in a similar context. See *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 819 (1988) (decision of coordinate court to transfer jurisdiction upheld under law-of-the case if "plausible"). Scheidegger, *supra*, 98 Colum. L. Rev., at 914-915 (discussing *Christianson*, *supra*).

Instead of examining the state court decision for error, habeas courts should see whether the decision is plausible. This is more than exchanging adjectives. "Plausible" is defined as "seemingly or apparently valid, likely or acceptable, credible . . . ." American Heritage Dictionary 1388 (3d ed. 1992). This shifts the inquiry away from whether the state decision was wrong to whether there are reasons that it could be right. If a reason for the decision can be found, it is not unreasonable. Federal courts applying § 2254(d) should first look for the positive in state court opinions before examining them for error.

Kibbe v. *Dubois*, 269 F. 3d 26 (CA1 2001) illustrates these principles. Kibbe was convicted in a Massachusetts court for arson of a building. *Id.*, at 28. The defendant ran from the police as they approached the crime scene. Once he was caught and read his *Miranda* rights, the defendant did talk to the police. See *id.*, at 28-29. At trial he testified that he ran because he was on parole, but he had not given this explanation to the police. See *id.*, at 29. Defense counsel commented in the opening and closing arguments that Kibbe voluntarily told the police what he was doing. See *ibid.* The prosecution argued at closing that Kibbe's failure to mention his reason for running from the police damaged his credibility, and that guilt should be inferred from flight. See *ibid.* The District Court found that this violated *Doyle* v. *Ohio*, 426 U. S. 610, 617-619 (1976) and

the state court opinion was contrary to *Doyle*. See *Kibbe*, *supra*, at 31. It also found that this was an unreasonable application of *Doyle*, but declined to develop that holding. See *id.*, at 32, n. 4. As an alternative holding, the District Court held that the state court had unreasonably applied the rule of *Anderson* v. *Charles*, 447 U. S. 404 (1980) to conclude that the defendant had waived his right to silence in its entirety, thus distinguishing *Doyle*. See *Kibbe*, *supra*, at 31. The District Court surveyed the treatment of similar cases in the federal circuits to come to the conclusion that "I am firmly convinced that error occurred and that the *Kibbe* decision is an unreasonable outcome." *Id.*, at 33.

After finding that the state court decision was not contrary to clearly established law, see *id.*, at 35-36, the Circuit Court turned to the unreasonable application standard. Applying the First Circuit's "plausible, credible outcomes" standard, the Circuit Court noted that the case fell outside the *Doyle* and *Charles* decisions. See *id.*, at 37. The fact that the issue was unresolved increases the chance "that there are other reasonable, yet contradictory, interpretations of Supreme Court precedent." *Ibid.* The state court's interpretation of *Doyle* and *Charles* was one alternative to the District Court's. See *ibid.* The First Circuit found that the state court's interpretation of *Charles* was credible, that "a court could plausibly argue that this holding should be extended to cover the facts of *Kibbe*'s case." *Id.*, at 38. This conclusion was supported by similar results in federal appellate decisions. See *id.*, at 38-39. However, it was not necessary for these precedents to point out the correct path of the law. "Furthermore, given its limited scope of review under the AEDPA, a federal habeas court ought not to provide the definitive answer to this open question." *Id.*, at 39. The state court decision did not have to be right, it only had to "rest[ ] upon a plausible interpretation of Supreme Court precedent . . . ." *Ibid.*

This approach addresses Andrade's claim much more accurately and economically than the Ninth Circuit's. Because

the state of the relevant Eighth Amendment precedents is so confused, contradictory but still reasonable alternative interpretations of this Court's cases are likely. The California court's opinion is a plausible interpretation of what authority can be drawn from *Harmelin*, *Solem* v. *Helm*, 463 U. S. 277 (1983), *Rummel* v. *Estelle*, 445 U. S. 263 (1980), and *Hutto* v. *Davis*, 454 U. S. 370 (1982).

This case is outside the facts of all four decisions. *Harmelin* and *Hutto* involved drug crimes, not recidivist schemes. *Solem*, in addition to being diminished by *Harmelin*, involved a harsher sentence. While Andrade's sentence is long, it is still less than the sentence of life without the possibility of parole in *Solem*. More importantly, Andrade's 40-year minimum is the result of two convictions with consecutive sentences, not the single conviction at issue in *Harmelin*, *Solem*, *Hutto*, and *Rummel*. "It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if the punishment for each were inflicted on him, he might be kept in prison for life." *State* v. *Four Jugs of Intoxicating Liquors*, 2 Atl. 586, 593 (Vt. 1886). Finally, Andrade's prior residential burglaries were more serious than Helm's third-degree burglaries. Residential burglary is more than a simple property crime. The federal sentencing guidelines require markedly enhanced sentences for offenders who have been convicted in federal courts for "a crime of violence" or "controlled substance offense" and have two or more prior convictions of such offenses. See U. S. Sentencing Guidelines § 4B1.1(1). Among the listed violent crimes is residential burglary. See *id.*, at § 4B1.2. As one federal judge has noted, "these subsections establish that an offense is a 'crime of violence' if injury occurs, is threatened, is attempted, or is likely." *United States* v. *Rutherford*, 54 F. 3d 370, 378 (CA7 1995) (Easterbrook, J., concurring). Since *Solem* has been diminished, and Andrade's criminal history is more severe than Helm's, it was plausible for the state court to distinguish *Solem*.

The California Court of Appeal's duty was to apply in a reasonable manner the principles of deference and objectivity from Justice Kennedy's opinion in *Harmelin*. The decision to not impose its own sentencing philosophy in place of that of the electorate and the sentencing judge[3] is consistent with the deference principle. Given the unsettled state of the law in this area, Andrade's more serious criminal history compared to any of the four defendants in the relevant Supreme Court authorities, and the fact that he was convicted of two separate felonies, the California appellate court's weighing of culpability and severity of punishment is plausible.

IV. If this Court subsequently invalidates part of California's three strikes scheme, the defendant can obtain relief in the California courts even if his claim is rejected in the present case.

The AEDPA should foreclose any holding on the merits of Andrade's Eighth Amendment claim. The Eighth Amendment status of California's three strikes law will be addressed on the merits in the separate case of *Ewing* v. *California*, No. 01-6978. For the reasons CJLF intends to brief in that case, the state should prevail on the straight merits. However, we will also address here the contingency of a change in the law wrought by *Ewing*.

If this Court decides that the statute is unconstitutional as applied in *Ewing*, the rejection of Andrade's federal habeas claim will not prevent him from obtaining reiief in the California courts. California allows successive habeas petitions for claims "based on a change in the law which is retroactively

3. Three strikes sentences are not truly mandatory. The sentencing judge has discretion to "strike" prior convictions in the interests of justice. See Cal. Penal Code § 1385; *People* v. *Superior Court (Romero)*, 13 Cal. 4th 497, 529-530, 917 P. 2d 628, 647 (1996); *People* v. *Williams*, 17 Cal. 4th 148, 161, 948 P. 2d 429, 437 (1998) (describing discretion).

applicable to final judgments." *People* v. *Clark*, 5 Cal. 4th 750, 775, 855 P. 2d 729, 745 (1993). Given the unsettled state of the Eighth Amendment in this area, any decision favoring *Ewing* would be a new rule. A decision in Ewing's favor would be retroactive on federal habeas under the first prong of *Teague* v. *Lane*, 489 U. S. 288 (1989) as it would prohibit a type of punishment for a class of defendant because of their status or offense. See *Penry* v. *Lynaugh*, 492 U. S. 302, 329-330 (1989). California's rule on retroactivity is even more generous. A habeas petition may raise an issue previously rejected on appeal "when there has been a change in law affecting the petitioner." *In re Harris*, 5 Cal. 4th 813, 841, 855 P. 2d 391, 407 (1993). If this Court decides in Ewing's favor, proper use of the AEDPA in the present case will not keep Andrade from getting any deserved relief in the California courts.

Federal habeas relief may not be granted if state remedies are not exhausted. See 28 U. S. C. § 2254(b). Exhaustion is determined in the present tense. The fact that an unexhausted remedy existed in the past does not preclude exhaustion if that remedy is no longer available. *Coleman* v. *Thompson*, 501 U. S. 722, 732 (1991). Conversely, the fact that the state courts did not offer a remedy at one point does not satisfy exhaustion if they offer one now.

In *Gusik* v. *Schilder*, 340 U. S. 128 (1950), Gusik was convicted of murder in a court-martial, and attacked the conviction through a habeas petition in federal District Court. See *id.*, at 129. The Court of Appeals reversed the District Court's grant of relief, holding that Gusik first had to exhaust a newly created administrative remedy. See *id.*, at 129-130. Therefore it dismissed the petition without prejudice to file a new petition after exhausting the administrative remedy. See *id.*, at 130. This Court held that instead of dismissing the petition, the Court of Appeals should have "held the case pending resort to the new remedy . . . ." *Id.*, at 133. If Gusik obtains administrative relief then the petition is dismissed, if he is unsuccessful it is reinstated, avoiding the cost of relitigation

See *id.*, at 133-134. While it disposed of the case differently, this Court still agreed with the main point of the Court of Appeal that the new remedy must be exhausted before being addressed in a federal habeas petition.

If this Court rules in favor of Ewing, Andrade's case should be treated similarly. The federal courts should either dismiss or withhold judgment on his claim until it is exhausted in the California courts. The dismissal rule is more strict now than it was at the time of *Gusik*. See *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982). A remand petition following exhaustion is not "successive." *Slack* v. *McDaniel*, 529 U. S. 473, 478 (2000). The statute of limitations "clock" resets upon announcement of the retroactive new rule. 28 U. S. C. § 2244(d)(1)(c). California's liberal approach to retroactivity on habeas corpus guarantees that Andrade would have his day in state court, and federal review would remain available in the highly unlikely event that California's courts fail to reasonably apply whatever new rule may be created in *Ewing*.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

June, 2002

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

30D

(7)

Supreme Court, U.S.
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No. 01-1127

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Petitioners-Appellees,

v.

LEANDRO ANDRADE,
Respondent-Appellant

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF ON THE MERITS OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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QUESTIONS PRESENTED

1. Whether California's three-strikes law, providing for a twenty-five year-to-life prison term for a third strike conviction, violates the Eighth Amendment's prohibition against cruel and unusual punishment when applied to a defendant whose third strike conviction is for petty theft with a prior theft-related conviction?

2. Whether, in light of this Court's existing jurisprudence concerning the Eighth Amendment and proportionality in noncapital cases, the judgment of the California Court of Appeal, holding Andrade's consecutive twenty-five years to life sentences for convictions on two counts of petty theft with a prior, involved an unreasonable application of clearly established federal law as determined by this Court within the meaning of 28 U.S.C. § 2254(d)(1)?

3. Whether the Ninth Circuit or the Fourth Circuit is correct, concerning the necessity for a habeas court analyzing a claim under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, to first decide if the state court's determination was erroneous before deciding whether the determination was contrary to, or involved an unreasonable application of, clearly established federal law as determined by this Court?

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IDENTITY AND INTEREST OF AMICUS CURIAE

The California District Attorneys Association (CDAA) has more than 2,400 prosecutors in its membership. We present this amicus brief, pursuant to Supreme Court Rule 37, in support of Petitioners.[1] The elected District Attorneys of San Bernardino and Contra Costa Counties submit this amicus brief as the attorneys authorized to represent CDAA. We also have obtained and filed the parties' written consent to this brief.

CDAA has a strong interest in preserving California's **right to sentence recidivist offenders** in the manner which the California State Legislature and the California electorate have deemed appropriate. CDAA seeks to ensure that California retains its right to develop an **independent penological scheme**. As representatives of California's citizens, CDAA also has **a compelling interest** in guarding **against the erosion of the basic tenets of federalism**.

While three questions are presented to this Court, CDAA's primary concern is only whether California's "Three Strikes" sentencing statutes constitute cruel and unusual punishment when applied to Respondent Andrade. Accordingly, we address only that issue.

---

[1] Pursuant to Rule 37.6, CDAA discloses that the Attorney General's Office copied and bound CDAA's amicus brief.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals' opinion in this case contains significant errors. As a consequence, that court determined that "Three Strikes" sentencing imposed a cruel and unusual punishment. The opinion mischaracterizes Respondent's **present crimes**, his **criminal history**, and his **present sentence.** The opinion is also **premised upon incorrect comparisons between recidivists' crimes and non-recidivists' crimes**.

Correct application Eighth Amendment principles establishes that Respondent's sentence ***is not* grossly disproportionate** to sentences authorized for and imposed upon recidivist criminals.

We ask this Court to so hold and, therefore, to determine that Respondent Andrade's sentence **did not** constitute cruel and unusual punishment.

I.
THE COURT OF APPEALS MISCONSTRUED CALIFORNIA PENAL LAW AND MISCHARACTERIZED THE FACTS OF THIS CASE. ITS CONCLUSIONS ARE THEREFORE WRONG.

The Court of Appeals held that California's "Three Strikes" statutes[2] imposed upon Respondent sentences grossly disproportionate to his crimes and, therefore, his overall sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment. We believe that the Court of Appeals **erred in its conclusion because it erred in numerous of its premises**.

A. RESPONDENT'S PRESENT CRIMES ARE NOT "MISDEMEANOR PETTY THEFT" UNDER CALIFORNIA LAW.

The Court of Appeals repeatedly characterized Respondent's present crimes as "misdemeanor petty theft." *See, e.g., Andrade v. Attorney General of State of California* (9th Cir. 2001) 270 F.3d 743, 746, 749, 760, 766, 767. This is **incorrect under California law**.

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[2] California has two "Three Strikes" statutes. The California State Legislature enacted the first statute. Cal. Pen. Code §§ 667(b)-(i). Effective March 7, 1994. The electorate enacted the second statute on November 8, 1994. Cal. Pen. Code § 1170.12. Because Respondent's crimes were committed on November 4, 1995, our references are to the initiative version.

Respondent's crimes were ***felony*** petty thefts. "Petty theft with a prior conviction of theft"[3] has been part of the California Penal Code since 1872. It is an "alternative felony crime" - one that is chargeable and punishable *either* as a felony or as a misdemeanor.[4]

An alternative felony crime or "wobbler" **charged as a felony remains a felony *unless*** a court imposes a misdemeanor sentence. *In re Anderson*, 69 Cal.2d 613, 664, fn.16, 73 Cal. Rptr. 21, 447 P.2d 117 (1968); *People v. Banks* 53 Cal.2d 370, 381-382, 1 Cal. Rptr. 669, 348 P.2d 102 (1959); *People v. Bozigian*, 270 Cal.App.2d 373, 379, 75 Cal.Rptr. 876 (1969); *People v. Washington*, 243 Cal.App.2d 681, 687-688, 52 Cal.Rptr. 668 (1966).

A California sentencing court may reduce a "wobbler" to a misdemeanor ***even when*** the defendant has suffered prior "felony strike" convictions. *People v. Superior Court (Alvarez)* 14 Cal.4th 968, 979, 60 Cal.Rptr.2d 93, 928 P.2d 1171 (1997).[5] If the court does not do so, the crime is a felony.

When such a felon has suffered prior convictions within the meaning of California's "Three Strikes" statutes, they must be proven or admitted. After the "felony strikes" have been proven or admitted, the trial judge still may dismiss them.[6]

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3 Cal. Pen. Code §666 requires a present theft event, a prior conviction for a theft-related crime and a term of imprisonment in county jail or state prison.

4 Cal. Pen. Code §17.

5 Respondent made an oral motion pursuant to California Penal Code §17 on March 20, 1996, to reduce one or more of his theft convictions to misdemeanors. The trial court denied the motion. (See *People v. Andrade*, No. E018257, unpublished opinion of Court of Appeal, May 13, 1997, page 9).

6 Cal. Pen. Code §1385

People v. Superior Court (Romero), 13 Cal.4th 497, 53 Cal.Rptr.2d 789, 917 P.2d 628 (1996). When the defendant has been found guilty of multiple current charges, the court may dismiss "felony strikes" as to one crime and may decline to dismiss them as to another current crime. *People v. Garcia*, 20 Cal.4th 490, 499-500, 85 Cal.Rptr.2d 280, 976 P.2d 831 (1999).

If a court does not dismiss *all* "felony strikes," a defendant's conviction becomes subject to the "Three Strikes" sentencing statutes. The "Three Strikes" statutes supplant the ordinary sentencing scheme for the underlying felonies. *People v. Dotson*, 16 Cal.4th 547, 556, 66 Cal.Rptr.2d 423, 941 P.2d 56 (1997); *People v. Superior Court (Romero), supra*, at 524.

Thus, a defendant who is convicted of a **felony theft offense** and who has suffered at least two "felony strikes" **is not** punished ***simply*** for **felonious theft.** He is punished instead under the Three Strikes sentencing scheme, which mandates harsh punishment ***only*** for those with the qualifying prior convictions. In other words, he is **punished for his recidivism**. *People v. Lawrence*, 24 Cal.App.4th 219, 226-227 (2000) 99 Cal.Rptr.2d. 570.

Respondent's present convictions **are *not*** for "misdemeanor petty theft." Calling Respondent's present convictions "misdemeanor petty thefts" is wholly inaccurate.[7] They are for ***felony*** **petty theft, with a prior conviction of petty theft.** This is

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7 The memorandum opinion in *Riggs v. California*, 525 U.S. 1114, 119 S.Ct. 890, 142 L.Ed.2d 789 (1999), makes the same error when it characterized Riggs' conviction as a "misdemeanor petty theft."

important. A sentence of 25 years to life for "misdemeanor petty theft" may be cruel and unusual punishment; the same sentence for a felony committed by a recidivist who has at least three prior serious felony convictions under state law is not.

B. "SHOPLIFTING" CARRIES WITH IT VIOLENCE POTENTIAL.

The opinion mischaracterizes Respondent's crimes by pretending that "petty thefts" are **crimes with no violence potential**.

Respondent's crimes involved thefts of merchandise from a department store.[8] On both occasions, store personnel stopped Respondent as he left. Such encounters frequently occur. Because shoplifting is a significant problem for retail establishments, businesses employ security personnel to detect and to apprehend shoplifters.

Shoplifters who are detected frequently attempt to escape. Some escape attempts result in **violent**

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[8] The economic seriousness of Respondent's crimes is not measured by the value of the property he stole - $153.54 in videotapes. Shoplifting causes annual losses to merchants estimated in the billions of dollars, forcing retail businesses like K-Mart, the victim of Respondent's crimes, to hire and maintain large security staffs to combat such pestilence. In 2000, for example, one source indicates that United States retailers lost $32.3 billion to theft, 1.75% of their total sales, up from $29 billion the year before, which was 1.69% of total sales. Richard C. Hollinger, PhD & Jason L. Davis, *2001 National Retail Security Survey*, (University of Florida 2001). Other sources have placed annual shoplifting losses at $7.2 billion. David A. Anderson, *The Aggregate Burden of Crime*, 42 J. Law & Econ. 611, 638 (Univ. Chi. 1999).

confrontations when the thieves use force or fear against store personnel or other citizens attempting to apprehend them. When a thief in California uses force or fear to escape with merchandise taken in a commercial shoplift, **the thief is properly charged with robbery**. *See, e.g., People v. Estes*, 147 Cal.App.3d 23, 194 Cal.Rptr. 909 (1983). These robberies are punishable under California Penal Code §211 in the manner in which all unarmed robberies are punishable.

Confrontations between shoplifters and those trying to stop them **can escalate to deadly confrontations**. See *People v. Weddle*, 1 Cal.App.4th 1190, 1198, fn. 9, 2 Cal.Rptr.2d 714 (1991).

This Court has recognized that a crime presenting **a threat of violence** is more serious than **a clearly nonviolent offense**. *Solem v. Helm*, 463 U.S. 277, 293-294; 103 S.Ct 3001, 77 L.Ed.2d 637 (1983) ["nonviolent crimes are less serious than crimes marked by violence **or the threat of violence.**" [emphasis added]].

C. THE COURT OF APPEALS' OPINION PRESENTS AN INACCURATE PICTURE OF RESPONDENT'S CRIMINAL HISTORY.

The goals of a recidivist criminal statute are to:

> [d]eter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense **but also on the *propensities he has demonstrated* over a period of time during which he has been convicted of and sentenced for other crimes.**

Rummel v. Estelle, 445 U.S. 263, 276, 100 S.Ct. 1133, 63, 284-285 [emphasis added]. The Court of Appeals failed to appreciate certain "propensities" in Respondent's background.

1. Respondent's Felony Strikes Carried the Potential For Violence.

Respondent's "felony strikes" consisted of three convictions for first-degree residential burglary.[9] The

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[9] This fact is noted in Judge Sneed's concurring and dissenting opinion in *Andrade v. Attorney General, supra*, at 772. Andrade's probation report establishes that he was arrested and booked by the Sheriff of San Joaquin County (Stockton), California, on no less than **10 residential burglaries** on November 30, 1982.

Court of Appeals characterized these burglary convictions as being **non-violent crimes**. *Andrade v. Attorney General, supra*, at 761. However, even if a residential burglary does not ***actually* involve** violence, it has **great *potential* for violence**.

In *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990, the Court recognized that "burglary is one of 'the most common violent street crimes," and the character of a burglary "can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is still on the premises." 495 U.S. at 581; *see also id.* at 588.

2. California Has Determined That Residential Burglary Is A Serious Felony.

California's courts have construed the language of the serious felony list in Cal. Penal Code § 1192.7(c) to mean that ***all* burglaries** of inhabited residences are **serious felonies is a matter of law**. *People v. Cruz*, 13 Cal. 4th 764, 773, 112 Cal.Rptr.2d 643, 919 P.2d 731 (1996); *People v. Garrett*, 92 Cal.App.4th 1417, 112 Cal.Rptr.2d 643 (2001); *People v. Gomez*, 24 Cal.App.4th 22, 29 Cal.Rptr.2d 94 (1994).

The Court of Appeals failed to appreciate this determination. The Court thus wrongly avoided **numerous important consequences** flowing from them. ***First***, there is no **plea-bargaining of "serious felony" charges**.[10] ***Second***, a defendant **may not be released without a hearing** and a finding of "unusual circumstances."[11] ***Third***, a prior conviction of a

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[10] Cal. Pen. Code §§1192.7 (a) and (b).

[11] Cal. Pen. Code §§1270.1, 1275(c).

serious felony constitutes a **mandatory, non-strikeable five-year enhancement** to a current serious felony conviction.[12] ***Fourth***, a prior conviction of a serious felony **constitutes a "felony strike."**[13] ***Finally***, a serious felony conviction **may preclude probation or a suspended sentence** on a new felony conviction,[14] and **may make a defendant ineligible for drug treatment** for a current nonviolent drug possession offense.[15]

These restrictions on burglary prosecutions reflect the legislative and electoral determination that the crime of residential burglary is one of the **most serious crimes** against the citizens of this state. The failure of the Court of Appeals majority to acknowledge this determination makes their other conclusions flawed.

3. The Court of Appeals Disregarded Respondent's Federal Felony Convictions.

After Respondent served a prison term for his burglaries, he was convicted of transportation of marijuana in **two separate federal prosecutions**. Respondent was sentenced to federal prison after each conviction. The Court of Appeals majority gave **short shrift to these convictions**, saying that "there is no record that the court considered them when sentencing Andrade," and "the federal convictions therefore should not affect our analysis as they did not affect the imposition of Andrade's 50-year-to-life sentence." *Andrade v. Attorney General, supra,* at 760. This "logic" is error.

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12 Cal. Pen. Code §667 (a).
13 Cal. Pen. Code §§667(c), 1170.12(a).
14 Cal. Pen. Code §§1203.085(a)(b), 1203(k).
15 Cal. Pen. Code §1210.1(b)(1).

Respondent's convictions ***were*** listed in the "prior record" portion of Respondent's pre-sentence report. A California court is ***required*** to consider a defendant's **entire criminal history** when imposing sentence.[16] Unless the record "affirmatively reflects otherwise," the sentencing judge is deemed to have considered the relevant criteria.[17]

The concurring opinion of Justice Kennedy in *Harmelin v. Michigan* (1991) 501 U.S. 957, 1002, 111 S.Ct. 2680, 115 L.Ed.2d 836, expanded upon the *Solem* Court's description of the seriousness of illegal drug dealing[18] by pointedly concluding:

> "Possession, use, and distribution of illegal drugs represent 'one of the greatest problems affecting the health and welfare of our population.' [citation] Petitioner's suggestion that his crime was nonviolent and victimless. . . is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society."

The Court of Appeals erred again by casting aside Respondent's prior federal drug dealing offenses

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16 Cal. Pen. Code §1203(b)(3); California Rules of Court, Rules 4.409 and 4.410.
17 California Rules of Court, Rule 4.409; *People v. Noran* (1970) 1 Cal.3d 755, 83 Cal.Rptr. 411, 463 P.2d 763; California Evid. Code §664 [presumption that official duty has been regularly performed].
18 In *Solem v. Helm, supra,* this Court described the crime of ***heroin dealing*** as a "very serious offense." 463 U.S. at 299.

before it measured Respondent's sentence against the Eighth Amendment.

4. If Respondent's Recidivism Was "Double-Counted," His Many Convictions Were Not.

Respondent's current offenses were charged as felonies under Penal Code § 666 because of his **1990 misdemeanor conviction of petty theft**. However, it was Respondent's **three felony residential burglary convictions**, not his misdemeanor petty theft convictions, which exposed him to the life terms. Thus, although literally true that Respondent's "recidivism" was double counted, *Andrade v. Attorney General, supra,* at 760, 761, ***different* aspects of his recidivism** had ***different* effects** on his state court sentence.

5. *Rummel* Mandated Consideration of Respondent's Prior Prison Terms.

Because this case involves the ***application*** of California's "Three Strikes" statutes **to Respondent**, *Andrade v. Attorney General, supra,* at 767, it is appropriate to consider ***all* relevant facts about the Respondent,** whether or not those facts -- such as **service of a prison term** -- are a component of "Three Strikes" sentence provisions.

The *Andrade* opinion described Respondent's "entire criminal history" as: "five felonies, two misdemeanors, and one parole violation." *Andrade v. Attorney General, supra,* at 760. It fails to mention that Respondent served **three separate prison terms**. Respondent was "in and out of state or federal prison a total of six times." *Andrade v. Attorney General, supra,* at 772 (Sneed, J., concurring and dissenting).

In *Rummel v. Estelle, supra,* this Court **emphasized** the importance of Rummel's **two prior prison terms**:

> "[A] recidivist must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released. One in Rummel's position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail."

445 U.S. at 278.

The failure of the Court of Appeals to ***mention*** Respondent's three prior prison terms casts great doubt upon the correctness of its ultimate conclusion.

6. Analysis

These shortcomings paint a false portrait of Respondent's "propensities." Respondent is a **heroin user** and **illegal drug distributor** who **repeatedly stole** to support his drug habit, who over the years before the present offenses committed and was convicted of at least **three residential burglaries**, which California law defines as serious felonies with serious violence potential, who committed and was convicted of **two separate charges of transportation of marijuana**, crimes which constitute **a threat to cause grave harm to society**, who was committed to prison on **three separate occasions on these felony convictions**, and whose **parole was violated** more than once.

D. THE COURT OF APPEALS' OPINION IS PREMISED UPON FALSE COMPARISONS.

1. Respondent's Sentence is Not "50 Years to Life."

The Court of Appeals characterized Respondent's sentence as a sentence of "50-years-to-life," or words to that effect, *Andrade v. Attorney General, supra*, at 746, 767, although at other times the Court of Appeals correctly called the sentence "two consecutive indeterminate sentences of 25 years to life in prison." *Id.*, at 758.

Respondent was sentenced for ***two*** separate felonies. The correct description of Respondent's sentence thus is **two consecutive indeterminate sentences of life in prison, each with a 25-year minimum term.** A correct characterization of Respondent's sentence is essential to compare properly his sentence with the sentences other felons face.

2. Respondent's Sentence is Not a "Life Without Possibility of Parole" Sentence.

The Court declared that Respondent's sentence was "the functional equivalent of the sentences ... in *Solem* and *Harmelin* - life in prison without the possibility of parole." *Andrade v. Attorney General, supra*, at 759. The court did so because the length of Andrade's **minimum term of his life sentence exceeded his expected life span**. *Id.*

The sentence known as "LWOP" is an acronym for "life without **the *possibility* of parole."** The

difference is important. The sentences imposed upon the defendants in *Solem v. Helm, supra*, and *Harmelin v. Michigan, supra*, were life sentences **without the possibility of parole**. *Solem v. Helm, supra*, at 282; *Harmelin v. Michigan, supra*, at 2684. Thus, they would **never outlive** their imprisonment, no matter what.

Respondent's sentence is ***different*** from the sentence imposed on Helm and Harmelin. Respondent's sentence **is not** "without the possibility of parole." While he might be 87 years old before he becomes eligible for parole, and he might not live to see his 87th birthday, Mr. Andrade has the ***possibility* of parole.** A defendant sentenced in California to an ordinary life term is eligible for parole when he or she has served the minimum term. Cal. Pen. Code §3046. Here, the "minimum term" for each conviction is 25 years.

If a criminal defendant's age and expected lifespan were determinative of the character of his life sentence, ***any defendant*** who is 55 years of age and who is sentenced to a determinate term 25 years in prison could thereafter claim that he is serving a life sentence without the possibility of parole because actuarial tables tell us that he probably could not outlive that sentence. Yet a defendant who is 20 years of age and who is sentenced to prison for 50 years to life could not make the cruel and unusual punishment claim, **because his or her expected lifespan would extend *beyond* the date of his parole eligibility.** Such thinking is dubious logic, at best.

3. Respondent's life sentence is the shortest per count life sentence permitted by "Three Strikes" and is not a generic sentence.

The Court of Appeals assumed that Respondent's sentence was **identical to every other life term sentence** because ***all*** California's "Three Strikes" sentences are life terms. *Andrade v. Attorney General, supra,* at 767, fn.24. The court then used this fact to conclude that Respondent's case "is unusual even when compared to other three-strikes defendants" who committed more serious crimes. *Id.*

In truth, Respondent's minimum term of his life sentence is the ***shortest per count*** minimum term that Three Strikes permits; it is ***significantly shorter*** than the ***minimum terms under "Three Strikes" for current crimes considered to be more serious.***

Every person sentenced under the life term component of California's "Three Strikes" statutes receives the same basic sentence - a life term.[19] However, the sentencing of a life term defendant is a three-step process. Step one is the imposition of the life term. Step two is the determination of the minimum term.[20] Step three is the imposition of enhancements.[21]

Therefore, although the basic life sentence under "Three Strikes" is the same for all defendants who are convicted of a new felony and who have two or more "felony strikes," the minimum terms and enhancements vary greatly depending upon the

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19 Cal. Pen. Code §1170.12(c)(2)(A).

20 Cal. Pen. Code §1170.12(c)(2)(A).

21 Cal. Pen. Code §1170.12(c) ["in addition to any other enhancements or punishment provisions which may apply."]

seriousness of the current offense and the defendant's criminal record.

The first method of calculating the minimum term is a term that is "three times the term otherwise provided as punishment for each current felony conviction."[22] *People v. Dotson,* 16 Cal.4th 547, 552, 66 Cal.Rptr.2d 423, 941 P.2d 56 (1997) [determinate terms]; *People v. Murphy,* 25 Cal.4th 136, 105 Cal.Rptr.2d 387, 19 P.3d 1129 (2001); *People v. Mendoza* 78 Cal.App.4th 918, 93 Cal.Rptr.2d 216(2000) [indeterminate terms].

The second method of calculating the minimum term is **a fixed minimum term of 25 years**.[23] *People v. Dotson, supra*; *People v. Dozier,* 78 Cal.App.4th 1195, 1201-1202, 93 Cal.Rptr.2d 600 (2000). Respondent's minimum terms resulted from this option.

The third method of calculating the minimum term is to calculate the total sentence (including enhancements) as it would have been calculated in the absence of "Three Strikes."[24]

After calculating the minimum term for an offense under all three options, the court must impose the ***greatest*** minimum term.[25] Thus, the ***minimum***

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22 Cal. Pen. Code §1170.12(c)(2)(A)(i).

23 Cal. Pen. Code §1170.12(c)(2)(A)(ii).

24 Cal. Pen. Code §1170.12(c)(2)(A)(iii) ["the term determined by the court pursuant to §1170 for the underlying conviction. . ."]; *People v. Ruiz* 44 Cal.App.4th 1653, 1665, 52 Cal.Rptr.2d 561 (1996) ["Option (iii) permits the sentencing court to calculate the minimum term pursuant to existing law."]

25 The "Three Strikes" statutes incorrectly use the term "greater." Since the correct grammatical term when comparing three or more choices is "greatest," California courts

term of a defendant with two "felony strikes" convicted of first degree murder **would be *75* years**, the ***greatest*** minimum term.[26]

This method of calculating the minimum term under "Three Strikes" means that the minimum term of a defendant convicted of a current ***violent*** offense **will always be greater** than the minimum term of Respondent's life terms.

The third step in the sentencing of a life term defendant is the addition of sentence enhancements - e.g., enhancements for use of a firearm or a deadly weapon or for infliction of great bodily injury, and status enhancements for prior convictions.[27] The enhancements must be added to and must be consecutive to the life term,[28] and are in addition to the minimum term of the life term. *People v. Dotson, supra.*

These last two steps produce *great* gradations in the length of time that defendants who are sentenced to life term sentences under California's "Three Strikes" statutes must actually serve in prison. For example, the first degree murderer who utilizes a firearm and who has two "felony strikes" must be sentenced under "Three Strikes" to life in prison, with

(..continued)

have construed the statutory term "greater" to mean "greatest." *People v. Dotson, supra,* at 552-553.

[26] The prescribed sentence in California for first-degree murder without special circumstances is 25 years to life. Cal. Pen. Code §190(a).

[27] Cal. Pen. Code §1170.12(c) ["[I]n addition to any other enhancements or punishment provisions which may apply. . . ."]

[28] Cal. Pen. Code §1170.12(c)(2)(B); *People v. Hendrix,* 16 Cal.4th 508, 515, 66 Cal.Rptr.2d 431, 941 P.2d 64 (1997).

a **75 year minimum term**, ***and*** two forms of enhancements - 25 years to life in prison for the firearm use[29] and ten years for the prior serious felonies.[30] The total sentence would be **110 years to life in prison.**

Thus, life-term sentences **of violent felons** under "Three Strikes" are **considerably longer** than Respondent's terms.

4. Comparing Multiple Conviction Sentences With Single Conviction Sentences.

The Court of Appeals' opinion compared Respondent's **total sentence**, which is comprised of shorter sentences on ***multiple current convictions***, to sentences for other persons based on a ***single current conviction***. The concurring and dissenting judge in the Court of Appeal caught this error. *Andrade v. Attorney General, supra,* at 771, fn.4 (Sneed, J., concurring and dissenting).

To compare Respondent's total sentence for ***two new and separate felonies*** to the sentence of other persons convicted of only ***one*** new felony is **a faulty comparison**. *See, e.g., United States v. Aiello,* 864 F.2d 257, 265 (2d Cir. 1988); *accord, Hawkins v. Hargett,* 200 F.3d 1270, 1285, fn.5 (10th Cir. 1999).

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[29] Cal. Pen. Code §12022.53(d).

[30] Cal. Pen. Code §667(a).

5. Comparing A Recidivist Sentence With A Non-Recidivist Sentence.

The Court of Appeals pointedly rejected Petitioner's argument that the appropriate comparison of Respondent's sentence is to the sentences of **other** non-violent recidivists in California, saying that the argument

> "attempts to justify the constitutionally-suspect application of a statute by pointing to other applications of the same statute. We find this approach less than convincing."

Andrade v. Attorney General, supra, at 762.

We disagree. It is **illogical** to compare the sentence for a habitual criminal under a recidivist statute, which includes the fact that the felon is a recidivist offender, to the punishment of other persons who have committed crimes that in a vacuum are more serious, but who have ***not*** qualified as repeat felons. The appropriate comparison is between Respondent's sentence and the sentences for other persons who are ***similarly situated***.

II.

RESPONDENT'S SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

In *Solem v. Helm, supra,* this Court articulated a three-part test for conducting a proportionality analysis under the Eighth Amendment. These three parts are: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." 463 U.S. at 292.

In *Harmelin v. Michigan, supra,* a three justice concurring opinion articulated five principles that "give content to the uses and limits of proportionality review." These principles are: (A) **Deference to legislative authority** in making punishment choices, (B) **Acceptance of different penological theories**, (C) **Acceptance of divergent state views on crimes**, (D) Evaluating only **objective factors**, and (E) **Avoiding extreme, grossly disproportionate sentences**. 501 U.S. at 998-1001.

A. DEFERENCE TO LEGISLATIVE AUTHORITY

The power to define crimes and prescribe the punishments for their commission is "purely a matter of legislative prerogative." *Rummel v. Estelle, supra,* at 274. The legislature makes a judgment of the severity of a crime when it fixes the punishment for that crime. *Solem v. Helm, supra,* at 292. Federal courts should be "'reluctan[t] to review legislatively mandated terms of imprisonment'," *Hutto v. Davis,* 454 U.S. 370, 374, 102 S.Ct., 703, 70 L.Ed. 2d 556

(1982) citing *Rummel v. Estelle, supra,* at 274, and should "grant ***substantial deference*** to the broad authority that legislatures necessarily possess in determining the types and limits for crimes. . . ." *Solem v. Helm, supra,* at 290 (emphasis ours).

That the legislature should be the repository of the power to set prison terms for crimes is not new or novel.

> "[H]owever socially desirable the goals sought to be advanced. . ., advancing them through a freewheeling nonelected judiciary is quite unacceptable in a democratic society."

William H. Rehnquist, *The Notion of a Living Constitution,* 54 Tex. L. Rev. 693, 699 (1976). That these ultimate decisions as to people's freedoms should be in the hands of the legislature, instead of the hands of the judiciary, which is the least democratic branch of the government,[31] is a well-established principle ignored below.

The "Three Strikes" statutes were enacted in 1994 by an overwhelming vote of California's legislature and then by more than **71% of the California electorate** on November 8, 1994. *People v. Ingram,* 40 Cal.App.4th 1397, 1416, 48 Cal.Rptr.2d 256 (1995). **This reflects social values of Californians**. *People v. Ayon,* 46 Cal.App.4th 385, 400, 53 Cal.Rptr.2d 853 (1996). That "Three Strikes"

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[31] Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument,* 72 Iowa L.Rev. 35, 36 (1986); Jesse H. Choper, *Judicial Review and the National Political Process,* 4, 5 (1980); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review,* 73-75, 77-78 (1980).

was enacted with almost 75% support of the electorate is evidence that the punishments of "Three Strikes" are neither cruel nor unusual.[32] *See Rummel v. Estelle, supra,* at 275-276.

As the dissent perceptively wrote:

> "Our deference [to a state's legislative authority] should be at its apex. We have before us ***the clearest indication possible*** that a severe, mandatory sentence for recidivist offenders is the express penal philosophy of the citizens of California. The initiative process permits the electorate to speak for itself, and its voice ***should be heard, not ignored***."

Andrade v. Attorney General, supra, at 768 (Sneed, J., concurring and dissenting (emphasis ours)).

In passing the Three Strikes laws, California's legislature and electorate have determined that a defendant who commits **any** new felony (serious or not) **knowing that he faces dire consequences by virtue of prior convictions of serious felonies** is an intransigent criminal impervious to deterrence. *See People v. Edwards,* 97 Cal.App.4th 161, 165-166, 118 Cal.Rptr.2d 256 (2002).

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[32] The California Court of Appeal observed in 1996, "it may be inferred from the passage of Proposition 184 that considerably more than two-thirds of California voters do not consider it cruel or unusual punishment for a recidivist offender convicted of a serious felony with prior convictions for violent or serious felonies to receive a 25-year-or-more-to-life sentence." *People v. Ayon,* 46 Cal.App.4th 385, 400, 53 Cal.Rptr.2d 853 (1996).

B. ACCEPTANCE OF DIFFERENT PENOLOGICAL THEORIES

The "Eighth Amendment does not mandate adoption of any one penological theory." *Harmelin*, 501 U.S. at 999. California adopted the Determinate Sentence Law (DSL) and expressly declared that the purpose of **incarceration is *punishment***.[33] The "Three Strikes" statutes are an important part of **California's punitive penological theory**. The uncodified preface of the initiative version stated:

> "It is the intent of the People of the State of California in enacting this measure to ***ensure longer prison sentences and greater punishment*** for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."[34]

The principal penological theory of California's "Three Strikes" statutes is ***incapacitation of the habitual serious/violent felony offender***. *People v. Ingram, supra,* at 1415.[35]

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[33] Cal. Pen. Code §1170(a)(1) ["The Legislature finds and declares that the purpose of imprisonment for crime is punishment."]

[34] Similar language is codified in the "Three Strikes" statute enacted by the Legislature. Cal. Pen. Code §667(b).

[35] The change to a penological theory of incapacitating habitual criminals appears to have worked. California has enjoyed a 41% drop in its crime rate since it adopted the "Three Strikes" laws in 1994, while the rest of the country experienced a decline of only 19%. Federal Bureau of Investigation, *Crime in the United States*, Unified Crime Reports (1993, 1999).

C. ACCEPTANCE OF DIVERGENT STATE VIEWS ON CRIME AND PUNISHMENT

It is "an inevitable and often beneficial result of a federal structure" that there will be "marked divergences" in sentences and in the length of prison terms among the states. *Harmelin v. Michigan, supra,* at 1000 (Kennedy, J. concurring). The Eighth Amendment ***does not*** compel a state to enact criminal statutes that mirror those of the other states. Thus, there will always be ***some state*** whose punishments for crimes are the greatest. *Rummel v. Estelle, supra,* at 282.

Even if the *Andrade* majority opinion is correct and California's "Three Strikes" statutes are the most severe, *Andrade v. Attorney General, supra,* at 765, that fact is **in itself** meaningless. California is not mandated to conform its penal statutes to the "majority rule" or to the least common denominator of nationwide penalties. "Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." *People v. Martinez*, 71 Cal.App.4th 1502, 1516, 84 Cal.Rptr.2d 638 (1999).

D. EVALUATION BASED ONLY ON OBJECTIVE FACTORS.

A cruel and unusual punishment determination should not totter upon the subjective views of the nine justices who happen to sit on this Court's bench when such a claim is presented. *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). The objective factors which have been identified are the following: (1) the gravity of the offense; (2) the harshness and the type of the punishment; (3) sentences imposed on other criminals in the same jurisdiction; and (4) sentences imposed for the same crime in other jurisdictions. *Harmelin v. Michigan, supra,* at 1000 (Kennedy, J., concurring); *Solem v. Helm, supra,* at 290-292.

Differences in the severity of terms of imprisonment are extremely difficult for a court to assess. Indeed, such measurements have been declared "purely a matter of legislative prerogative." *Rummel v. Estelle, supra,* at 274. In *Solem v. Helm, supra,* at 294, the Court expanded upon the same theme:

> "It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not."

This led the concurring justices in *Harmelin v. Michigan, supra,* at 1001, to state:

> "[W]e lack clear objective standards to distinguish between sentences for

> different terms of years. . . the relative lack of objective standards concerning terms of imprisonment has meant that " '[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [are] exceedingly rare.' " [citations]"

E. AVOIDANCE OF EXTREME, GROSSLY-DISPROPORTIONATE SENTENCES.

The Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan, supra,* at 1001 (Kennedy, J., concurring). A punishment is not cruel and unusual unless that punishment is "grossly disproportionate" or "significantly disproportionate" to the crime. *Rummel v. Estelle, supra,* at 281; *Solem v. Helm, supra,* at 288, 290, fn.17, 303.

Where distinctions in punishments are "subtle rather than gross," *Rummel v. Estelle, supra,* at 279, even where the challenged punishment is the "most stringent found in the 50 States, that severity hardly would render [a challenged] punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States." *Rummel v. Estelle, supra,* at 281.

Here, we submit that Respondent's sentence is not grossly disproportionate **in light of his criminal background:** the felony thefts, burglaries, drug dealing and addiction more than justify the two 25 to life terms he received.

F. APPLICATION

These principles lead to the conclusion that Respondent's sentence **does not constitute cruel and unusual punishment**. He is a recidivist of the first water, who has chosen to deal drugs and commit thefts to support his heroin habit, ***after*** having suffered multiple convictions of residential burglary, a crime California defined as "serious" before he chose to commit them and as a "strike" after he did so. Having committed serious property crimes and serious drug offenses, it is hardly surprising that Respondent's recidivism has earned him a harsh sentence.

CONCLUSION

Respondent's punishment is **a manifestation of California's penological theory that *recidivist* felons should be punished, deterred, and incapacitated**. Where an incorrigible recidivist felon like Andrade shuns rehabilitation, rejects the lessons of previous punishment, and fails to be deterred, the safety and comfort of society demands incapacitation. The means chosen by California are **indeterminate prison terms**, which have **high minimum terms and a maximum of life in prison**.

This penological theory is the product of overwhelming support in the California Legislature and among the California electorate. The punishment inflicted upon Respondent is severe, but is not grossly disparate when compared to punishments imposed upon other recidivist felons in California and recidivist felons in other jurisdictions.

That other criminals—some bloodthirsty—are more dangerous than Andrade does *nothing* for Andrade. He is a scoundrel, too, a scoundrel who has had his chances. Andrade meets the threshold; he has descended below the line. He is a danger to California and so we have incapacitated him. We doubt that the framers of the Eighth Amendment or the states that ratified it would have had *any* objection.

In order to generate sympathy, counsel paints a false picture of our Three Strikes law, and so does the Court of Appeals. **Petty thieves are *not* rotting in California dungeons for their petty thievery**. Instead, "Three Strikers" have ***earned*** their long sentences because they are the most thick-skulled and predictably wicked of felons. They hurt people, they hurt communities, and they hurt our economy. What remains but to remove them from us for long periods of time?

Additionally, **our Three Strikes law is not a merciless machine**. Lest the law prematurely ensnare an offender who is not yet hopelessly hardened, there are avenues of eseape along the way. Most of these are controlled by the judiciary, not the prosecution. Trial courts may reduce "wobbler" felonies to misdemeanors, thus removing defendants from the clutches of the Three Strikes scheme. They may also, in their sound discretion, strike the prior strike allegations from the charges in the furtherance of justice and where a defendant falls "outside the spirit" of the law, thus reducing the strike sentence or eliminating it altogether. That the California judiciary took a look at Andrade and determined he had nothing coming only reinforces our contention that ***he deserves his long sentence.***

Andrade **is not** the poster child for **overturning** California's just laws, and the Eighth Amendment does not so require.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, Attorney General of California,

Petitioner,

v.

LEANDRO ANDRADE,

Respondent.

On Writ of Certiorari
to the Court of Appeals of the Ninth Circuit

AMICUS CURIAE BRIEF ON BEHALF OF RESPONDENT LEANDRO ANDRADE

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

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QUESTION PRESENTED BY AMICUS CURIAE

In determining whether a Three Strikes sentence is "grossly disproportionate" to a defendant's crime, should this Court consider the punishment provided as less severe merely because under the California statutory scheme a judge is given the discretion to impose a lesser sentence than the maximum permitted under the Three Strikes law?

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AMICUS CURIAE BRIEF ON BEHALF OF RESPONDENT LEANDRO ANDRADE

INTEREST OF THE AMICUS CURIAE[1]/

The Los Angeles County Public Defender's Office is primary trial counsel in the County of Los Angeles for all persons charged with crimes who are indigent and unable to afford private counsel. The Office is the largest office of trial counsel for criminal defendants in the State of California, with over 670 lawyers. Los Angeles County has the greatest number of defendants sentenced to life in prison under California's Three Strikes law, and the Los Angeles County Public Defender's Office has represented a sizeable majority of those defendants. The Los Angeles County Public Defender's Office represented defendant Gary Ewing (petitioner in Ewing v. California, No. 01-6978) in the trial court wherein he was sentenced to 25-years-to-life in prison.

The Los Angeles County Public Defender's Office has particular experience regarding judges' practice in exercising their limited power to impose sentences less than the life sentence called for by the Three Strikes law. Due to its representation of thousands of Three Strikes defendants who have been sentenced to life in prison, the Los Angeles County Public Defender's Office is well-qualified to assist this Court in the issues raised in this case. The Los Angeles County

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[1]/ No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the Los Angeles County Public Defender's Office, made any monetary contribution to its preparation or submission. See Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of this Court. Rule 37.3(a).

Public Defender's Office is familiar with the questions involved herein, and the scope of their presentation.

Moreover, this Court's decision on the constitutionality of California's Three Strikes law will have a great impact on the Los Angeles County Public Defender's Office. It will be the Los Angeles County Public Defender's Office, along with the trial courts and prosecutors, which will have to work to implement whatever relief this Court provides to alleviate the plight of defendants serving life sentences for non-serious offenses.

SUMMARY OF THE ARGUMENT

In June of 1996, a little over two years after the enactment of California's Three Strikes law, the California Supreme Court held that a judge has the power to impose a lesser sentence than life in prison if he or she finds it would be "in furtherance of justice" to do so. (People v. Superior Court (Romero), 13 Cal.4th 497 (1996).) The Los Angeles County Public Defender's Office's argument is that although the power to impose lesser sentences under the Three Strikes law technically exists, California cases subsequent to Romero have greatly narrowed the scope of a judge's discretion, deterring judges from reducing sentences, and rendering the power virtually useless even to attempt to mitigate sentences on non-serious and non-violent current crimes.

The extremely limited nature of judicial power here is aptly illustrated by two Los Angeles County cases. In one, the judge refused to exercise his discretion to reduce a sentence even though the defendant's current offense was attempting to break into a church to steal food. (People v. Taylor, BA153296.) In the other, the current offense was unlawful driving of a vehicle and receiving stolen property. The

California Court of Appeal in People v. Gaston, 74 Cal.App.4th 310 (1999) reversed the trial judge's attempt to sentence the defendant to less than 25-years-to-life in prison, despite the fact that the defendant's "strikes" occurred 17 years before the current offenses and that the defendant was suffering from diabetes.

Empirical evidence supports the Los Angeles County Public Defender's argument. A report promulgated by the independent State of California Legislative Analyst's Office (attached as Appendix A) concluded that bench officers in California failed to appreciably change their sentencing practices of people convicted of non-serious and non-violent current offenses after the Romero decision.

Likewise, statistics from California's Department of Corrections (attached as Appendices B1-B5) regarding prisoners sentenced to life sentences under the Three Strikes law in California also establish affirmatively that the power to impose lesser sentences had very little impact on the sentencing of people convicted of merely non-serious and non-violent offenses.

The conclusion is inescapable: contrary to the Attorney General's argument in its Petitioner's Brief on the Merits (PBM), the cited power to dismiss "strikes" has failed to function as a "safety valve" to prevent injustices. (PBM, at p. 16.) The fact that bench officers' power extends to impose lesser sentences is not something which should in any manner be construed to decrease the severity of the Three Strikes law's penalty.

ARGUMENT

I

JUDGES' POWER TO IMPOSE SENTENCES LESS THAN THE MAXIMUM PROVIDED BY THREE STRIKES IS EXTREMELY LIMITED, EVEN TO MITIGATE THE SENTENCES OF DEFENDANTS CONVICTED OF NON-SERIOUS CURRENT OFFENSES

A. California's Three Strikes Law

The Three Strikes law in California specifies that a defendant convicted of any current felony who has suffered two or more prior specified convictions must be sentenced to at least 25-years-to-life in state prison. (Cal. Pen. Code, §§ 667, subd. (e)(2); 1170.12, subd. (b)(2); all further statutory references to the Three Strikes law will be to that in Cal. Pen. Code § 667, subds. (b)-(i).)

To count as valid priors under the Three Strikes law, a defendant's prior convictions must be either "serious" or "violent" (as listed in Cal. Pen. Code, §§ 667.5, subd. (c), and 1192.7, subd. (c)), or, if they originated from crimes committed as a child, they must be listed in California Welfare and Institutions Code section 707, subdivision (b). "Serious" and "violent" felonies, as well as those in section 707, subdivision (b), are nearly uniformly aggravated offenses involving violence and sex crimes. (Virtually all § 667.5, subd. (c) and § 707, subd. (b), priors are subsumed within the list of "serious" felonies in Cal. Pen. Code, § 1192.7, subd. (c); hence, for simplicity's sake, references herein to "serious" crimes

should be understood to also include ones in § 667.5, subd. (c) and § 707, subd. (b).)

One remarkable aspect of the Three Strikes law is that the defendant's current offense need not be "serious" to count as a "strike": any and every felony can count as the current offense which triggers a life sentence.

B. The Origin Of The Judges' Limited Power To Sentence Defendants To Less Than Life In Prison

The California Supreme Court has determined that if a defendant has two or more "strike" priors and commits a new felony, a judge has the power to sentence a defendant to less than life in prison, provided that the judge finds that it would be "in furtherance of justice" to do so. (People v. Superior Court (Romero), 13 Cal.4th 497 (1996).) Romero stated that the source of judges' power is California Penal Code section 1385.

Penal Code section 1385, subdivision (a), provides, in relevant part,

> "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes"

The California Supreme Court in Romero held that a judge can use Penal Code section 1385 to dismiss, not only an entire case or "action," but also part of an action, such as an enhancement for a prior conviction. Romero ruled that a judge could use section 1385 to strike or dismiss a prior under the Three Strikes law, rendering the defendant punishable as if the

prior was never proved. Romero concluded that the power to dismiss under section 1385 was neither expressly nor impliedly abrogated by the Three Strikes law.

Romero cautioned, however, that "A court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385(a), and is subject to review for abuse." (People v. Superior Court (Romero), supra, 13 Cal.4th 497, 530.) Romero admonished that a judge would act improperly and be subject to a reversal on appeal if he dismissed "strike" priors, "guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant, while ignoring defendant's background, the nature of his present offenses, and other individualized considerations. (Id., at p. 531, quotation marks omitted.)

C. The Judges' Power Is Actively Restricted By The California Supreme Court

The Attorney General asserts that judges "have discretion to dismiss strikes in the interest of justice . . . ." (PBM, at p. 6.) The Attorney General fails to mention that this "discretion" is extremely circumscribed.

What the California Supreme Court acknowledged in Romero, it largely took away when it issued its opinion one and a-half years later in People v. Williams, 17 Cal.4th 148 (1998). In Williams, the defendant was convicted of the current offense of driving under the influence of alcohol with three drunk driving priors. This was one of many "wobbler" offenses under California law, punishable either as a felony or misdemeanor, and not sanctioned as a "serious" offense. Ordinarily, if treated as a misdemeanor, the maximum punishment would have been one year in jail, but, because

California allows driving under the influence to be considered aggravated if the defendant is a recidivist, the sentence as a felony could be up to 16 months, two, or three years in prison. However, the defendant was subject to the Three Strikes law because he had two prior convictions, an attempted robbery and a rape.

The trial judge determined under all of the circumstances that it would be unjust to sentence the defendant to 25-years-to-life in prison, so he dismissed one of the defendant's priors, and imposed a nine-year sentence. Due to statutory limitations on custody credits, the defendant would have had to serve 80%, or approximately seven years of the sentence, before being released from prison. (See Cal. Pen. Code, § 667, subd. (c)(5).)

The California Supreme Court in Williams reversed the trial judge, who had heard and seen witnesses and considered all the evidence first-hand, holding he abused his discretion in sentencing the defendant to less than 25-years-to-life. Regardless of the fact that the defendant would not be eligible for parole until he had spent 25 actual years in prison (In re Cervera, 24 Cal.4th 1073 (2001)), the Williams court held that such a sentence was appropriate for the defendant.

Williams articulated the following standard to determine whether an abuse of discretion has occurred,

> "[T]he court in question must consider whether, in light of the nature of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes law's] spirit . . . ." (People v. Williams, supra, 17 Cal.4th 148, 161.)

The California Supreme Court substituted its judgment for that of the trial judge, and found nothing favorable or mitigating about the defendant's current offense of felony drunk driving, and nothing favorable about his priors. Williams went over the defendant's "background, character, and prospects," and acknowledged that the defendant had "a stable living arrangement with a woman, had expressed a desire to help care for their disabled child, and was still loved, and supported, by his family." (People v. Williams, supra, 17 Cal.4th 148,163.) However, given the nature of the defendant's priors, Williams determined that none of this took him outside the law's "spirit," and directed that the order dismissing a prior be vacated.

D. Appellate Cases Illustrate The Extremely Narrow Scope And Precarious Nature Of Judicial Power Under Section 1385 Even When The Current Offense is Unaggravated

The California Courts of Appeal following Williams have demonstrated that judges' power to dismiss "strikes" is not very potent. Following Williams, in cases where the defendant's current offense was a "serious" felony, and the judge had shown leniency, the outcome of the appeals was predictable: the judge was reversed because the defendant fell within the "spirit" of the Three Strikes law. (See People v. McGlothin, 67 Cal.App.4th 468 (1998) [current crimes of robbery, attempted robbery, and misdemeanor battery on an officer]; People v. Thornton, 73 Cal.App.4th 42 (1999) [current crimes of burglary and robbery involving a 77-year-old neighbor].)

After Williams, even in cases when the current offense was not serious, and the judge dismissed priors and sentenced a defendant to less than life in prison, the judge was reversed; in cases where the current offense was not serious and the

judge refused to dismiss any priors, sentencing the defendant to life in prison, the judge was affirmed. (See, e.g., People v. Zichwic, 94 Cal.App.4th 944 (2002) [current offense of burglary of an automobile]; People v. Stone, 75 Cal.App.4th 707 (1999) [current offense of manufacturing PCP]; People v. Gaston, supra, 74 Cal.App.4th 310 [current offenses of driving a vehicle without the owner's consent and receiving stolen property]; People v. Myers, 69 Cal.App.4th 305 (1999) [current offense of possession of a firearm following felony conviction]; People v. Cline, 60 Cal.App.4th 1327 (1998) [current offenses of grand theft and commercial burglary].)

II

TWO CASES LITIGATED IN LOS ANGELES COUNTY SHOW THE EXTREMELY LIMITED NATURE OF JUDICIAL POWER REGARDING THREE STRIKES

Good examples of the limit of judicial power can be found in two cases litigated in Los Angeles County, People v. Taylor, BA153296, and People v. Gaston, supra, 74 Cal.App.4th 310. Both cases show that despite non-aggravated facts and copious mitigating evidence, judges often refuse to exercise their Penal Code section 1385 power, and, when they do, the judges are likely to be reversed on appeal.

A. People v. Taylor

The Los Angeles County Public Defender's Office represented a defendant who exemplifies the injustices brought about by California's Three Strikes law. The defendant in People v. Taylor, BA153296, committed the current offense of commercial burglary in 1997 by trying to get into a church to steal food. This was a "wobbler" offense, punishable with up

to one year in jail as a misdemeanor, and normally no more than three years in prison if sentenced as a felony. (See Cal. Pen. Code, § 17, 461, subd. (2).) However, because two "strike" priors for robberies, one from 1984, and the other from 1985, were found true, the defendant was eligible for a life sentence under the Three Strikes law.

Associate Justice Earl Johnson Jr. from the California Court of Appeal described the defendant's case in the following manner: "In a scenario somewhat reminiscent of a late 20th-century, real life Les Miserables, a hungry, homeless man is sent away for 25 years to life for trying to break into a church so he could eat some food he thought the church would be glad for him to have." (People v. Taylor, found at 71 Cal.App.4th 693, Johnson, J., dissenting; the Court of Appeal did not address any issues regarding Cal. Pen. Code, § 1385, and the appellate case was subsequently reversed by the California Supreme Court on a claim-of-right ground. See S079437. The Court of Appeal on remand affirmed the defendant's conviction, again not reaching any § 1385 issues, and the Supreme Court this time denied review. See S079437.)

At the defendant's sentencing on November 20, 1997, the defendant's lawyer pleaded that the trial judge exercise his discretion under Penal Code section 1385, and not sentence the defendant to 25-years-to-life in prison. The defendant's lawyer argued that the defendant's prior convictions were both suffered over 10 years before the current offense and no weapons were used in the priors. The lawyer further argued that the current offense was extremely non-aggravated, and called as a witness to address the judge a priest from the church involved in the case.

Father Allan McCoy requested that the judge not sentence the defendant to 25-years-to-life in prison. Father McCoy told

the court that he knew the defendant to be a peaceful man, and that it would not be just or merciful to impose such a sentence on a good person who made mistakes.

Nonetheless, the judge refused to exercise his discretion to dismiss a "strike" under Romero and Penal Code section 1385. The judge sentenced the defendant to 25-years-to-life in prison.

B. People v. Gaston

The Los Angeles County Alternate Public Defender's Office represented the defendant in People v. Gaston at both the trial and appellate levels, and the Los Angeles County Public Defender's Office consulted with them in their representation. Gaston demonstrates what often happens when a judge decides to exercise leniency and the prosecution appeals: the case is reversed, and the trial judge is ordered to sentence the defendant to life in prison.

In Gaston, the defendant was convicted of unlawful driving of a vehicle and receiving stolen property for an incident involving the defendant's driving a stolen van in 1998. Both offenses were "wobblers," meaning that if they were punished as misdemeanors the defendant could have been sentenced to no more than one year in jail for both crimes. If punished as felonies, the defendant would normally been subject to a maximum of three years in prison for the two offenses. (See Cal. Pen. Code, §§ 17, 496, Cal. Veh. Code, § 10851; Cal. Pen. Code, § 654 would have barred the defendant being sentenced more than once for these two closely-related offenses.)

The defendant, however, had previously been convicted in 1981 of two "strike" priors, a robbery and a kidnaping. He was

thus subject to a sentence of up to 25-years-to-life in prison for the two current crimes.

The trial judge, after carefully assessing the defendant in person and considering all the facts, exercised discretion under Penal Code section 1385. The judge wrote a nine-page typed memorandum justifying his reasons for sentencing the defendant to less than life. (See People v. Gaston, supra, 74 Cal.App.4th 310, 318.) The judge stated in his written order that the defendant's "strike" priors occurred 17 years ago; that the defendant in his robbery prior was not a major participant or "ring leader" in the crime, and did not personally cause any physical harm to the victim; that in the kidnaping prior the defendant had picked up a girl outside her home and taken her down the street, with no physical harm to the person; that there were "absolutely no aggravating aspects" to the defendant's current crime of driving a stolen van; that the defendant was currently homeless, suffering from diabetes, and had been raised in a broken home. (Id., at pp. 319-320.)

The judge carefully exercised his discretion and dismissed the defendant's 1981 "strike" for robbery to achieve a just sentence. The judge sentenced the defendant to 10 years, out of which the defendant would have to serve at least eight years in prison before being released on parole. (People v. Gaston, supra, 74 Cal.App.4th 310, 314.)

The Court of Appeal reversed the judge's dismissal of the defendant's prior conviction. The Court of Appeal found that given the defendant's criminal record, "as to neither count can Gaston be 'deemed [to be] outside the [Three Strikes] scheme's spirit . . . .' (People v. Williams, supra, 17 Cal.4th at p. 161.)" (People v. Gaston, supra, 74 Cal.App.4th 310, 322.) Gaston ordered that the defendant serve 25-years-to-life in prison.

III

A REPORT FROM THE LEGISLATIVE ANALYST'S OFFICE AND STATISTICS FROM THE DEPARTMENT OF CORRECTIONS INDICATE THAT THE JUDGES' POWER TO EXERCISE LENIENCY HAS NOT HAD A SIGNIFICANT IMPACT ON DEFENDANTS

A. The Legislative Analyst's Report And its Significance

The California Legislative Analyst's Office (LAO) is an impartial government entity overseen by a 16-member, bipartisan committee in the California Legislature. The LAO "has been providing fiscal and policy advice to the Legislature for more than 55 years. It is known for its fiscal and programmatic expertise and nonpartisan analyses of the state's budget." (See http://www.lao.ca.gov/laofacts.html.)

1. The LAO Report:

On October 14, 1997, the LAO published a report entitled, "The 'Three Strikes and You're Out' Law: An Update." (See Appendix A, hereafter "LAO Report.") The report documented the number of defendants who had been sentenced to prison under the Three Strikes law for life, so-called "third strikers," and for doubled sentences, referred to in the Report as "second strikers." (LAO Report, at p. 1.)

One of the report's observations (which is fully substantiated by the statistics discussed in Section III(B) of this Brief), is that "Slightly more than half of third strikers were admitted to prison for a violent or serious offense." (LAO Report, at p. 2.) Put another way, the LAO Report concluded

that roughly one-half of the defendants serving life sentences under the Three Strikes law committed non-serious and non-violent current offenses to trigger their sentence.

The most relevant observation by the LAO for present purposes deals with the number of defendants serving life sentences under Three Strikes before judges were given power to dismiss "strikes" on June 6, 1996, and thereafter. The LAO noted that "about 120 third-strikers [are] admitted to prison each month." (LAO Report, at p. 5.) The LAO observed that, as of the date of the Report's publication in October 1997, "The number of third-strikers admitted to prison monthly has increased only slightly in the past two years." (LAO Report, at p. 5.)

The LAO then concluded, "The number has changed little since the Romero decision." (LAO Report, at p. 5.) The LAO provided a graphic chart showing the number of defendants being sentenced to prison before Romero was issued in June 1996, and after. (Ibid.) As the LAO noted, there was not much change in the numbers even after judges were given power to not sentence defendants to life in prison.

2. The significance of the LAO's conclusions:

Prior to Romero being issued, some case law existed regarding judges' power to sentence defendants to less than the maximum provided by Three Strikes. The vast majority of cases from the State Courts of Appeal had ruled that judges had no power to dismiss "strikes" and impose lesser sentences unless the prosecution consented. (See People v. Gore, found at 46 Cal.App.4th 1396, 1405, rev. gr. S048866 [collecting cases].)

Presumably, when the California Supreme Court issued Romero, more judges should have started to use their newly-given authority, resulting in fewer defendants being sentenced to life in prison on a month-by-month basis. Yet, the LAO could find no appreciable change in the number of defendants coming to prison on life sentences. The LAO's conclusion that the number of defendants being sentenced to life in prison since Romero had "changed little" (LAO Report, at p. 5), underscores the conclusion that the existence of judicial power has not greatly affected the application of the Three Strikes law.

B. Department of Correction Statistics Show That The Composition Of The Inmate Population Serving Life Has Altered Little Since Romero Was Issued

The California Department of Corrections (DOC) is the government institution in charge of administering California' vast penal system. It runs 33 state prisons, with a total inmate population of 157,035 as of the end of the second quarter of 2002. (See http://www.cdc.state.ca.us/factsht.htm.)

The DOC website provides summaries of the most current statistical information about the DOC, its budget, programs, and facilities. It also maintains extensive statistics on the composition of its inmate population, including statistics regarding defendants serving time under the Three Strikes law.

The Los Angeles County Public Defender provides this Court with the methodology used to analyze the statistics from the DOC, the statistics themselves, and an explanation of their significance.

1. Notes on the methodology:

Currently available on the DOC website are statistics regarding defendants serving doubled sentences and life sentences under the Three Strikes law starting from September 30, 2001. The DOC has been publishing statistics on Three Strikes from before this date, and the Public Defender is in possession of these documents.

The statistics relevant to this Court involve a breakdown by types of offenses which triggered a life sentence under the Three Strikes law. These statistics corroborate the LAO's observation that approximately one-half of the defendants serving life sentences under Three Strikes are in due to non-serious current offenses. (See LAO Report, at p. 2.) The statistics also show that the percentage of defendants serving life due to non-serious offenses--including the offenses at issue before this Court in the Andrade and Ewing cases, petty theft with a prior and grand theft--has not changed significantly before and after Romero was issued.

The DOC separates defendants' crimes into 33 categories of offenses, including murder, robbery, rape, kidnaping, as well as non-aggravated crimes like petty theft with a prior, non-vehicular grand theft, commercial/vehicular burglary, and possession of controlled substances for personal use. The DOC also provides categories titled "Missing," which denotes defendants for which it could not find the type of crime committed, and "Other offenses," which signifies crimes falling within none of the 33 enumerated categories.

(The number of defendants within the categories of "Missing" and "Other offenses" is very small. For example,

the statistics as of May 31, 1996, attached as Appendix B1, noted 45 defendants as "Missing," and 24 in "Other offenses" out of a total of 1,891 defendants serving life in prison under Three Strikes. For the statistical percentages calculated below, the defendants in the "Missing" and "Other offenses" were deleted from consideration.)

In order to provide this Court with percentages of defendants serving life in prison at different times in the past, the Los Angeles County Public Defender separated the categories provided by the DOC between types of crimes which are categorized by California law as "serious" and "non-serious" offenses. Serious crimes are listed in California Penal Code section 1192.7, subdivision (c).

Serious felonies are crimes which are aggravated and usually involve violence. California's Three Strikes law has designated these crimes as sufficiently aggravated so that if a defendant has previously been convicted of one or more of them, the defendant should be given enhanced punishment upon committing a new felony. (The Three Strikes law also counts "violent" felonies listed in Cal. Pen. Code, § 667.5, subd. (c), and Cal. Welf. & Inst. Code, § 707, subd. (b), as "strike" priors; however, as previously noted, virtually all § 667.5, subd. (c) and § 707, subd. (b), priors are subsumed within the serious felony list in Cal. Pen. Code, § 1192.7, subd. (c).)

2. The DOC statistics on Three Strikes:

The most important statistics available are those from the month before Romero was issued in June 1996, and dates subsequent thereto.

(i) May 31, 1996

As of May 31, 1996, DOC statistics show that there were **1,822** defendants serving life in prison under Three Strikes for identifiable offenses. (May 31, 1996, DOC Statistics, attached as Appendix B1; as noted above, 45 defendants listed as "Missing" and 24 in "Other offenses" were subtracted from this total.)

53.4% of the total defendants serving life were committed due to non-serious current offenses. Of the total number of defendants, in **6.3%** (114), the current offense was petty theft with a prior (Cal. Pen. Code, § 666), the same offense at issue in Andrade. In **1.3%** (24), the current offense was non-vehicular grand theft (Cal. Pen. Code, § 487), the offense at issue in Ewing. Other notable categories included commercial/vehicular burglary (Cal. Pen. Code, § 459), which constituted **9.2%** (168) of the total; and possession of controlled substances for personal use (Cal. Health & Saf. Code, § 11350), which fell in at **10.2%** (186) of the total. (May 31, 1996, DOC Statistics.)

(ii) September 30, 1997

As of September 30, 1997, over a year after Romero was issued, the total number of defendants serving life in prison under Three Strikes for identifiable offenses was **3,537**, nearly double what it had been in May of 1996. (September 31, 1997, DOC Statistics, attached as Appendix B2.) The percentage of defendants serving life for non-serious offenses dropped from May 1996, but not significantly.

As of September 30, 1997, **48.4%** of the total defendants serving life were there due to non-serious current offenses. Of

this total, in **5.6%** (197) the current offense was petty theft with a prior; in **1.0%** (36) the current offense was non-vehicular grand theft; in **7.9%** (278) the current offenses were commercial/vehicular burglaries; and in **9.7%** (344) the current offense was possession of controlled substances for personal use. (September 30, 1997, DOC Statistics.)

(iii) May 31, 1999

As of May 31, 1999, nearly three years after Romero was issued, the total number of defendants serving life in prison under Three Strikes for identifiable offenses was **5,176**. (May 31, 1999, DOC Statistics, attached as Appendix B3.) **47.3%** of the total defendants serving life were there due to non-serious current offenses. Of this total, in **5.3%** (274) the current offense was petty theft with a prior; in **1.4%** (71), the current offense was non-vehicular grand theft; **7.0%** (364) were commercial/vehicular burglaries; and in **10.1%** (525) the current offense was possession of controlled substances for personal use. (May 31, 1999, DOC Statistics.)

(iv) August 31, 2000

As of August 31, 2000, the total number of defendants serving life in prison under Three Strikes for identifiable offenses was **6,189**. (August 31, 2000, DOC Statistics, attached as Appendix B4.) **46.8%** of the total defendants serving life were there due to non-serious current offenses. Of this total, in **5.2%** (323) the current offense was petty theft with a prior; in **1.6%** (96) the current offense was non-vehicular grand theft; **6.9%** (426) were commercial/vehicular burglaries; and in **10.0%** (616) the current offense was possession of controlled substances for personal use. (August 31, 2000, DOC Statistics.)

(v) March 31, 2002

Finally, under the latest available statistics, as of March 31, 2002, the total number of defendants serving life in prison under Three Strikes for identifiable offenses was **7,028**. (March 31, 2002, DOC Statistics, attached as Appendix B5.) **43.2%** of the total defendants serving life were there due to non-serious current offenses. Of this total, in **4.9%** (344) the current offense was petty theft with a prior; in **1.5%** (108), the current offense was non-vehicular grand theft; **6.5%** (455) were commercial/vehicular burglaries; and in **9.2%** (650), the current offense was possession of controlled substances for personal use. (May 31, 2002, DOC Statistics.)

3. Significance of the statistics:

Although relatively small, there were two cognizable drops in the percentage of defendants serving life for non-serious crimes: from 1996 to 1997, and again from 2000 to 2002.

The first decrease, however, can be explained as judges using their limited Penal Code section 1385 power to retroactively re-sentence defendants. The second decrease likely had nothing to do with judges' power. The second decrease was undoubtedly attributable to the charging practice of a new District Attorney elected in November 2000 in Los Angeles County, and the effect of Proposition 36, a voter-approved change in the law also effectuated in November 2000.

The vast numbers of defendants who are to this day being committed to prison for non-serious offenses strongly indicates that the existence of power under Penal Code section 1385 does not detract from the extreme severity of the punishment

provided by the Three Strikes law. Penal Code section 1385 is no solution to the injustice perpetrated by California's law.

(i) The 1996-1997 decrease

There was a drop in the percentage of non-serious defendants serving life in prison under Three Strikes from May 1996 to September 1997: the numbers dropped from 53.6% to 48.4%, a 5.2% drop. Yet, the numbers for subsequent years from 1997 to 2000, do not reflect any other significant drops. The numbers from 1997 (48.4%) to 2000 (46.8%) do not show a marked decrease.

Likewise, the drop in percentages of individual non-serious crimes between 1996 to 1997, was not replicated in the years from 1997 to 2000. Between 1996 and 1997 the percentage of defendants serving life for petty theft dropped from 6.3% to 5.6%; but between 1997 and 2000, the drop was only from 5.6% to 5.2%. The percentage of defendants whose current offense was grand theft actually increased from 1997 to 2000, from 1.0% to 1.6%, and the percentage of defendants whose current offense was possession of drugs for personal use also rose, from 9.7% to 10%.

The 1996-1997 drop can best be explained as judges using their limited power to correct sentences from before 1996. The California Supreme Court specifically rendered its opinion in Romero "fully retroactive," allowing judges to re-sentence defendants if they now believed that a life sentence would not be in furtherance of justice. (See People v. Superior Court (Romero), supra, 13 Cal.4th 497, 530, fn. 13.) The 5.2% drop in the number of defendants serving life for non-serious offenses thus was probably due to the use of judges' power to correct past sentences. The percentage of defendants serving

life for non-serious crimes remained fairly steady subsequently until after 2000.

(ii) The 2000-2002 decrease

The drop in the percentage of non-serious defendants serving life from August 2000 to March 2002, was from 46.8% to 43.2%, a 3.6% drop. The percentage of defendants serving life for petty theft between 2000 to 2002 dropped from 5.2% to 4.9%; the percentage of defendants whose current offense was grand theft slightly dipped from 1.6% to 1.5%; and the percentage of defendants whose current offense was possession of drugs for personal use dropped from 10% to 9.2%.

The 2000-2002 drop was almost certainly due to two developments. First was the election in November 2000, of Steve Cooley as the Los Angeles County District Attorney. Mr. Cooley instituted a policy whereby defendants whose current offense is a non-serious crime are presumed not to be eligible for a life sentence under the Three Strikes law. (See D.A. Website at, http://da.co.la.ca.us/mr/2000/121900b.htm.) Since Los Angeles is the largest county in California, and the source of the greatest percentage of Three Strikes defendants, Mr. Cooley's policy has undoubtedly had an impact on the drop in defendants serving life sentences under the law.

The other development was the enactment of Proposition 36 by the voters of California. Proposition 36, codified in California Penal Code section 1210, et seq., requires that defendants convicted of possession of drugs for their personal use be given probation and drug treatment instead of incarceration. Even defendants who have "strike" priors on their record are eligible for Proposition 36, provided they have satisfied a five-year "washout" since their conviction of their

priors. (See Cal. Pen. Code, § 1210.1, subd. (b)(1); People v. Superior Court (Jefferson), 97 Cal.App.4th 530 (2002).) The advent of Proposition 36 siphoned-off some defendants who would have otherwise received life sentences.

(iii) The numbers of defendants serving life reflect the severity of the law

The life sentences meted out to the thousands of defendants who are currently in prison under the Three Strikes law for non-serious current cases effectively rebuts the Attorney General's argument that the power to dismiss "strikes" has performed as a "safety valve" preventing unjust sentences. (PBM, at pp. 16, 24.) The power to dismiss "strikes" is not a remedy to the problems with the law.

Despite the existence of judicial power to dismiss "strikes" and to sentence defendants to less than life in prison, as documented by the latest statistics from the DOC, a whopping 43.2% the total number of defendants serving life were there due to non-serious current offenses. (May 31, 2002, DOC Statistics.) That comes out to about 3,036 persons whose current crime was non-serious, including 344 petty thieves, and 108 defendants who committed grand theft.

These numbers speak volumes regarding judges' power to dismiss "strikes": in the types of cases which would most likely warrant a reduction from a life sentence, where the current offense is a non-serious offense, thousands of cases ended with no judicial reduction under Penal Code section 1385. Judges' power to reduce sentences has not impacted California's Three Strikes law in any significant way.

CONCLUSION

In order to evaluate whether the Three Strikes law is constitutional, this Court will have to assess whether a life sentence is "grossly disproportionate" punishment to defendants' crimes. (See Harmelin v. Michigan, 501 U.S. 951, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment); Solem v. Helm, 463 U.S. 277, 290 (1983).) The fact that judges in California have power to reduce sentences under Penal Code section 1385 certainly did not help the defendants in Andrade and Ewing, who both received life sentences, and the same is true of the thousands of defendants serving life in prison for non-serious crimes.

Respectfully submitted,

MICHAEL P. JUDGE
PUBLIC DEFENDER
OF LOS ANGELES COUNTY
CALIFORNIA
Albert J. Menaster, and
Alex Ricciardulli, Deputy Public
Defenders

By _____
ALEX RICCIARDULLI
Los Angeles County Deputy Public Defender
Counsel of Record

Attorneys for Amicus Curiae in Support of
Respondent Andrade

APPENDIX A

The "Three Strikes and You're Out" Law: An Update

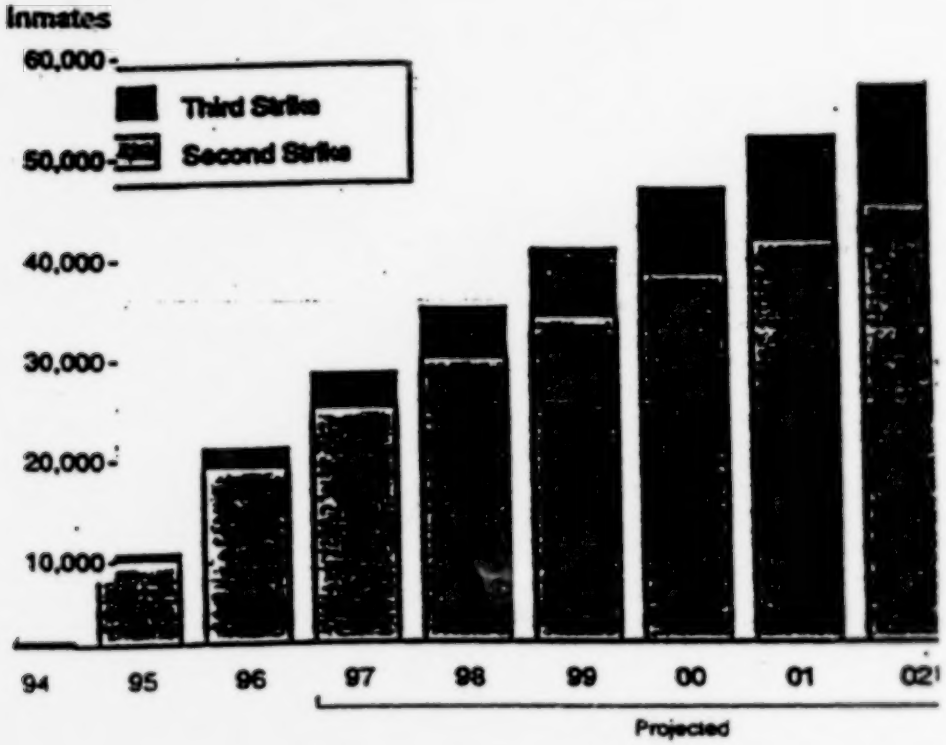
Presented To:

Assembly Public Safety Committee
Hon. Robert M. Hertzberg, Chair

LEGISLATIVE ANALYST'S OFFICE

October 14, 1997

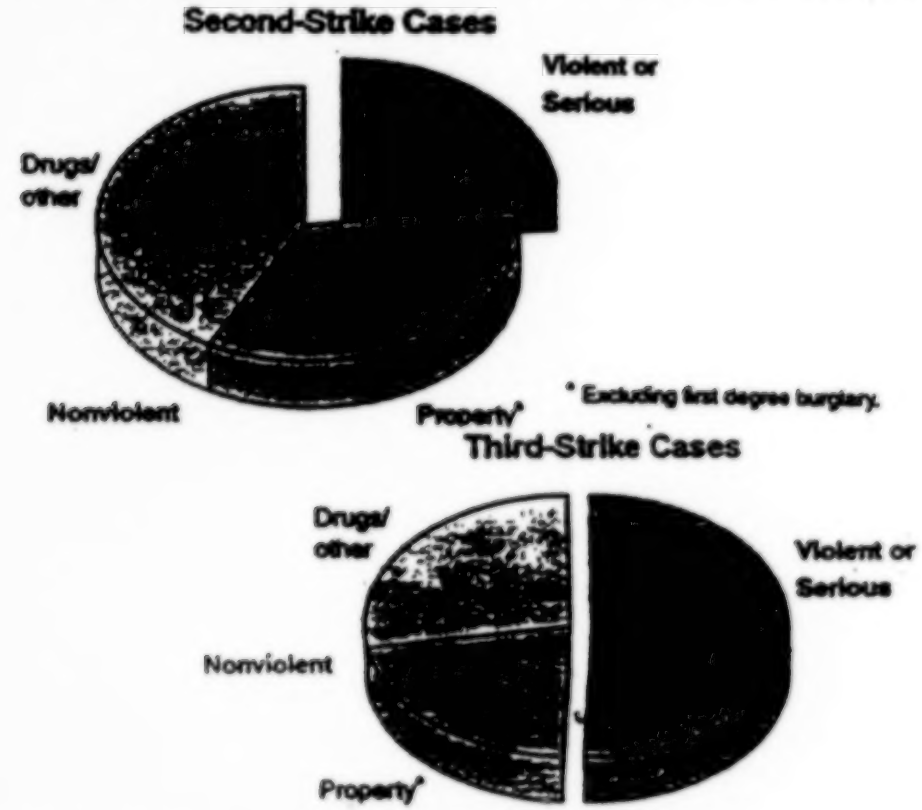
Second- and Third-Strike Inmate Population Increasing



The Department of Corrections (CDC) projects that the second- and third-strike prison population will exceed 55,000 by 2002, when one of four inmates in prison will be a "second-" or "third-striker."

It should be noted that the CDC has consistently overestimated the number of second- and third-strikers, although the estimates are becoming more accurate as the state gains more experience with the "Three Strikes" population.

Commitment Offenses Differ Substantially Among Second- and Third-Strikers



Less than one-fourth of ***second-strikers*** were admitted to prison fo a violent or serious offense.

The most common ***second-strike*** offenses are possession of controlled substance, petty theft with a prior theft, and second degre burglary.

Slightly more than half of ***third-strikers*** were admitted to prison fc violent or serious offense.

The most common ***third-strike*** offenses are robbery and first degre burglary (both are considered violent or serious offenses), followe by possession of a controlled substance, second degree burglary, an possession of a weapon.

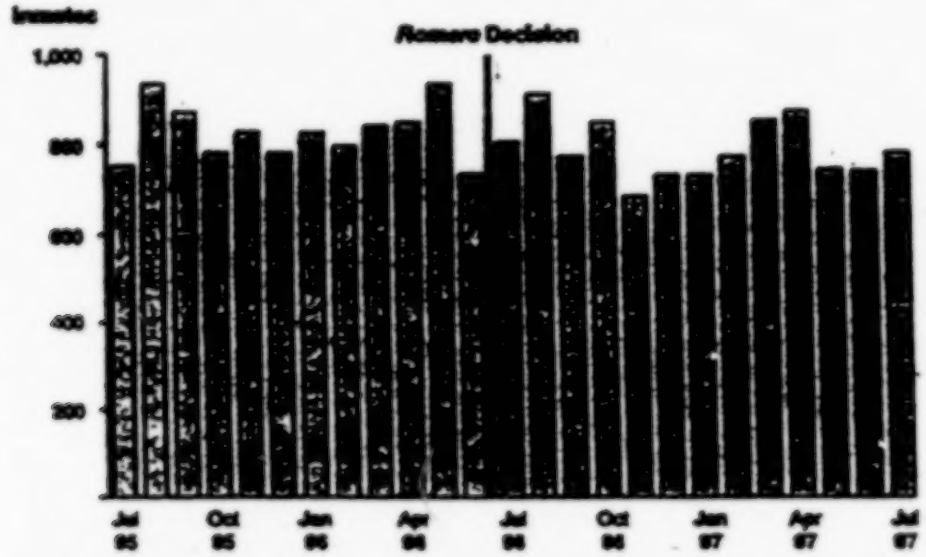
Counties' Commitment Patterns Vary

Selected Counties	Total Prison Population	Three Strikes Offenders: Second-Strikers	Third-Strikers
Alameda	3.1%	1.2%	1.6%
Kern	3.1	2.8	4.9
Los Angeles	35.8	43.9	41.5
Orange	5.4	5.3	5.2
Riverside	4.6	3.9	3.5
Sacramento	4.1	4.5	6.1
San Bernardino	5.6	4.5	5.1
San Diego	8.4	11.0	9.8
San Francisco	2.5	1.0	0.5
Santa Clara	3.6	3.9	4.0

Second- and third-strikers are being sent to prison in numbers that are not necessarily reflective of each county's general prison commitment patterns, as shown above.

The differences are primarily the result of variations in charging practices of prosecutors and sentencing practices of courts.

About 800 Second-Strikers Admitted to Prison Each Month

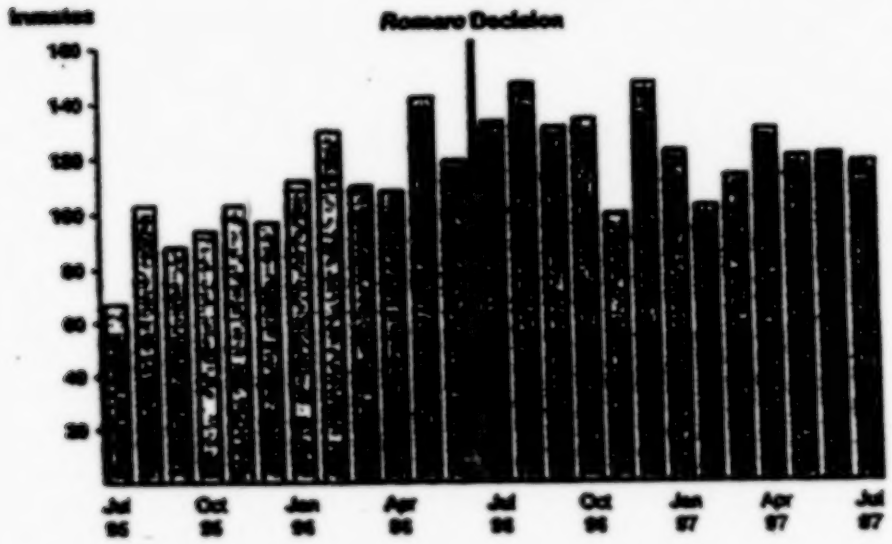


The number of second-strikers admitted to prison monthly has remained relatively constant in the past two years. The number has changed little since the *People v. Romero* court decision, which specifies that judges retain the authority to not consider prior convictions under the Three Strikes law.

Since its inception, there has been a total of 29,007 second-strikers admitted to prison.

As of the end of August 1997, there were about 24,600 second-strikers in prison or in a community correctional facility and about 4,400 second-strikers on parole.

About 120 Third-Strikers Admitted to Prison Each Month



The number of third-strikers admitted to prison monthly has increased only slightly in the past two years. The number has changed little since the *Romero* decision.

Since its inception, there has been a total of 3,568 third-strikers admitted to state prison. As of the end of August 1997, all were still incarcerated.

Prison System Faces Serious Housing Gap

	Capacity of Funded Prisons	June 2006 Inmate Population	Projected Housing Gap in 2006
Women	13,208	17,580	-4,357
Men (by security classification level)			
Reception	20,526	28,298	-7,772
I	26,890	50,643	-23,753
II	40,929	46,907	-5,978
III	39,928	59,777	-19,849
IV	28,225	36,035	-9,810
Special Housing	3,080	3,045	-15
Totals	170,781	242,285	-71,534

The total state prison population will increase substantially in the coming years, in large part because of the Three Strikes law.

Based on the most recent projections, the prison system will exhaust all available space by late 2000 and there will be a shortage of more than 70,000 beds to house the projected inmate population by 2006.

DATA ANALYSIS UNIT
ESTIMATES AND STATISTICAL ANALYSIS SECTION
OFFENDER INFORMATION SERVICES BRANCH

DEPARTMENT OF CORRECTIONS
STATE OF CALIFORNIA
JULY 10, 1996

APPENDIX B1

NUMBER OF THIRD STRIKE CASES BY OFFENSE GROUP AS OF MAY 31, 1996

Offense Group	Frequency Court	Percent of Total Frequency	Cumulative Frequency	Cumulative Percent
MISSING	45	2.4	45	2.4
MURDER 1ST	25	1.3	70	3.7
MURDER 2ND	22	1.2	92	4.9
MANSLAUGHTER	7	0.4	99	5.2
VEHICULAR MANSLAUGHTER	1	0.1	100	5.3
ROBBERY	300	15.9	400	21.2
ASSAULT DEADLY WEAPON	68	3.6	468	24.7
OTHER ASSAULT/BATTERY	68	3.6	536	28.3
RAPE	23	1.2	559	29.6
LEWD ACT WITH CHILD	42	2.2	601	31.8
ORAL COPULATION	10	0.5	611	32.3
SODOMY	5	0.3	616	32.6
PENETRATION WITH OBJECT	5	0.2	620	32.8
OTHER SEX OFFENSES	9	0.5	626	33.3
KIDNAPPING	15	0.8	644	34.1
BURGLARY 1ST	244	12.9	888	47.0
BURGLARY 2ND	168	8.9	1056	55.8
GRAND THEFT	25	1.3	1080	57.1
PETTY THEFT WITH PRIOR	114	6.0	1194	63.1
RECEIVING STOLEN PROPERTY	53	2.8	1247	65.9
VEHICLE THEFT	72	3.8	1319	69.8
FORGERY /FRAUD	13	0.7	1332	70.4
OTHER PROPERTY OFFENSES	10	0.5	1342	71.0
CS+ POSSESSION	186	9.8	1528	80.8
CS+ POSSESSION FOR SALE, ETC.	78	4.1	1606	84.9
CS+ SALES, ETC.	77	4.1	1683	89.0
CS+ OTHER	28	1.5	1711	90.5

MARIJ. POSSESSION FOR SALE	2	0.1	1713	90.6
MARIJUANA SALES	16	0.8	1729	91.4
OTHER MARIJ. OFFENSES	2	0.1	1731	91.5
ESCAPE	12	0.6	1743	92.2
DRIVING UNDER THE INFLUENCE	13	0.7	1756	92.9
ARSON	2	0.1	1758	93.0
POSSESSION OF WEAPON	109	5.8	1891	98.7
OTHER OFFENSES	24	1.5	1891	100.0

APPENDIX B1

DATA ANALYSIS UNIT
ESTIMATES AND STATISTICAL ANALYSIS SECTION
OFFENDER INFORMATION SERVICES BRANCH

DEPARTMENT OF CORRECTIONS
STATE OF CALIFORNIA
OCTOBER 16, 1997

NUMBER OF THIRD STRIKE CASES
BY OFFENSE GROUP
SEPTEMBER 30, 1997

Offense Group	Frequency Court	Percent of Total Frequency	Cumulative Frequency	Cumulative Percent
MURDER 1ST	76	2.1	76	2.1
MURDER 2ND	50	1.4	126	3.5
MANSLAUGHTER	18	0.5	144	4.0
VEHICULAR MANSLAUGHTER	1	0.0	145	4.0
ROBBERY	647	17.8	792	21.8
ASSAULT DEADLY WEAPON	161	4.4	953	26.2
OTHER ASSAULT/BATTERY	145	4.0	1098	30.2
RAPE	66	1.8	1164	32.0
LEWD ACT WITH CHILD	90	2.5	1254	34.5

APPENDIX B2

ORAL COPULATION	25	0.7	1270	35.2
SODOMY	12	0.3	1291	35.5
PENETRATION WITH OBJECT	12	0.3	1303	35.8
OTHER SEX OFFENSES	36	1.0	1339	36.8
KIDNAPPING	32	0.9	1371	37.7
BURGLARY 1ST	455	12.2	1816	49.9
BURGLARY 2ND	278	7.6	2094	57.6
GRAND THEFT	36	1.0	2130	58.6
PETTY THEFT WITH PRIOR	197	5.4	2327	64.0
RECEIVING STOLEN PROPERTY	87	2.4	2414	66.4
VEHICLE THEFT	126	3.5	2540	69.9
FORGERY /FRAUD	36	1.0	2576	70.8
OTHER PROPERTY OFFENSES	16	0.4	2592	71.3
CS+ POSSESSION	344	9.5	2936	80.7
CS+ POSSESSION FOR SALE, ETC.	141	3.9	3077	84.6
CS+ SALES, ETC.	121	3.3	3198	88.0
CS+ MANUFACTURING	10	0.3	3208	88.2
CS+ OTHER	52	1.4	3260	89.2

MARIJ. POSSESSION FOR SALE	1	0.0	3261	89.7
MARIJUANA SALES	18	0.5	3279	90.2
OTHER MARIJ. OFFENSES	2	0.1	3281	90.2
ESCAPE	20	0.4	3301	90.8
DRIVING UNDER THE INFLUENCE	17	0.5	3318	91.3
ARSON	9	0.2	3327	91.5
POSSESSION OF WEAPON	210	5.3	3537	97.3
OTHER OFFENSES	46	1.3	3583	98.5
UNCATEGORIZED	53	1.5	3636	100.0

APPENDIX B2

PREVIOUSLY PUBLISHED NUMBERS MAY VARY DUE TO RECENT MODIFICATIONS TO THE DATABASE

DATA ANALYSIS UNIT
ESTIMATES AND STATISTICAL ANALYSIS SECTION
OFFENDER INFORMATION SERVICES BRANCH

DEPARTMENT OF CORRECTIONS
STATE OF CALIFORNIA
JUNE 07, 1999

APPENDIX B3

THIRD STRIKE CASES
BY OFFENSE GROUP
MAY 31, 1999

Offense Group	Frequency Court	Percent of Total Frequency	Cumulative Frequency	Cumulative Percent
MISSING	64	1.2	63	1.2
MURDER 1ST	91	1.7	155	2.9
MURDER 2ND	83	1.6	238	4.5
MANSLAUGHTER	21	0.4	259	4.9
VEHICULAR MANSLAUGHTER	4	0.1	263	4.9
ROBBERY	979	18.4	1242	23.3
ASSAULT DEADLY WEAPON	241	4.5	1483	27.8
OTHER ASSAULT/BATTERY	277	5.2	1760	33.0
RAPE	81	1.5	1841	34.5
LEWD ACT WITH CHILD	135	2.5	1976	37.0
ORAL COPULATION	29	0.5	2005	37.6
SODOMY	14	0.3	2019	37.8
PENETRATION WITH OBJECT	16	0.3	2035	38.1
OTHER SEX OFFENSES	88	1.6	2123	39.8
KIDNAPPING	50	0.9	2173	40.7
BURGLARY 1ST	603	11.3	2776	52.0
BURGLARY 2ND	364	6.8	3140	58.9
GRAND THEFT	71	1.3	3211	60.2
PETTY THEFT WITH PRIOR	274	5.1	3485	65.3
RECEIVING STOLEN PROPERTY	121	2.3	3606	67.6
VEHICLE THEFT	163	3.1	3769	70.6
FORGERY /FRAUD	42	0.8	3811	71.4
OTHER PROPERTY OFFENSES	22	0.4	3833	71.8
CS+ POSSESSION	525	9.8	4358	81.7
CS+ POSSESSION FOR SALE, ETC.	218	4.1	4576	85.8
CS+ SALES, ETC.	163	3.1	4739	88.8
CS+ MANUFACTURING	18	0.3	4757	89.2
CS+ OTHER	73	1.4	4830	90.5

APPENDIX B3

MARIJ. POSSESSION FOR SALE	3	0.1	4833	90.6
MARIJUANA SALES	25	0.5	4858	91.1
OTHER MARIJ. OFFENSES	2	0.0	4860	91.1
ESCAPE	36	0.7	4896	91.8
DRIVING UNDER THE INFLUENCE	27	0.5	4923	92.3
ARSON	17	0.3	4940	92.6
POSSESSION OF WEAPON	300	5.6	5240	98.2
OTHER OFFENSES	95	1.8	5335	100.0

APPENDIX B3

PREVIOUSLY PUBLISHED NUMBERS MAY VARY DUE TO RECENT MODIFICATIONS TO THE DATABASE

DATA ANALYSIS UNIT
ESTIMATES AND STATISTICAL ANALYSIS SECTION
OFFENDER INFORMATION SERVICES BRANCH

DEPARTMENT OF CORRECTIONS
STATE OF CALIFORNIA
SEPTEMBER 11, 2000

THIRD STRIKE CASES BY OFFENSE GROUP AUGUST 31, 2000

Offense Group	Frequency Court	Percent of Total Frequency	Cumulative Frequency	Cumulative Percent
MISSING	65	1.0	65	1.0
MURDER 1ST	107	1.7	172	2.7
MURDER 2ND	89	1.4	261	4.1
MANSLAUGHTER	22	0.3	283	4.4
VEHICULAR MANSLAUGHTER	6	0.1	289	4.5
ROBBERY	1162	18.2	1451	22.8
ASSAULT DEADLY WEAPON	302	4.7	1753	27.5
OTHER ASSAULT/BATTERY	364	5.7	2111	33.2
RAPE	105	1.6	2222	34.9

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LEWD ACT WITH CHILD	172	2.7	2394	37.6
ORAL COPULATION	40	0.6	2434	38.2
SODOMY	16	0.3	2450	38.4
PENETRATION WITH OBJECT	13	0.2	2463	38.6
OTHER SEX OFFENSES	119	1.9	2582	40.5
KIDNAPPING	63	1.0	2645	41.5
BURGLARY 1ST	695	10.9	3340	52.4
BURGLARY 2ND	426	6.7	3766	59.1
GRAND THEFT	96	1.5	3862	60.6
PETTY THEFT WITH PRIOR	323	5.1	4185	65.7
RECEIVING STOLEN PROPERTY	151	2.4	4336	68.0
VEHICLE THEFT	197	3.1	4533	71.1
FORGERY /FRAUD	56	0.9	4589	72.0
OTHER PROPERTY OFFENSES	30	0.5	4619	72.5
CS+ POSSESSION	616	9.7	5235	82.1
CS+ POSSESSION FOR SALE, ETC.	261	4.1	5496	86.2
CS+ SALES, ETC.	176	2.8	5672	89.0
CS+ MANUFACTURING	21	0.3	5693	89.3
CS+ OTHER	83	1.3	5776	90.6

APPENDIX B4

MARIJ. POSSESSION FOR SALE	5	0.1	5781	90.7
MARIJUANA SALES	25	0.4	5806	91.1
OTHER MARIJ. OFFENSES	1	0.0	5807	91.1
ESCAPE	34	0.5	5841	91.6
DRIVING UNDER THE INFLUENCE	34	0.5	5875	92.2
ARSON	19	0.3	5894	92.5
POSSESSION OF WEAPON	360	5.6	6254	98.1
OTHER OFFENSES	118	1.9	6372	100.0
UNCATEGORIZED	2	0.0	6374	100.0

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DATA ANALYSIS UNIT
ESTIMATES AND STATISTICAL ANALYSIS SECTION
OFFENDER INFORMATION SERVICES BRANCH

DEPARTMENT OF CORRECTIONS
STATE OF CALIFORNIA
APRIL 2000

APPENDIX B5

SECOND AND THIRD STRIKERS IN THE INSTITUTION POPULATION BY OFFENSE CATEGORY, OFFENSE GROUP AND ADMISSION OR RETURN STATUS AS OF MARCH 31, 2002

	ADMISSION OR RETURN STATUS				
	3rd Striker	2nd Striker	2nd Striker PV-RTC	2nd Striker PendRev	Total Number
TOTAL	7,167	31,651	2,086	1,057	41,961
Crimes Against Persons					
OFFENSE GROUP					
MURDER 1ST	167	0	0	0	167
MURDER 2ND	127	237	0	0	364
MANSLAUGHTER	34	217	4	2	257
VEHICULAR MANSLAUGHTER	8	55	1	0	64
ROBBERY	1,408	4,225	115	48	5,796
ASSAULT DEADLY WEAPON	356	1,979	83	26	2,444
OTHER ASSAULT/ BATTERY	416	1,841	108	45	2,410
RAPE	136	188	0	5	329
LEWD ACT WITH CHILD	241	634	13	6	894
ORAL COPULATION	45	51	1	1	98
SODOMY	16	17	0	0	33
PENETRATION WITH OBJECT	20	35	0	1	56
OTHER SEX OFFENSES	136	801	67	44	1,048
KIDNAPPING	83	141	1	1	226
SUB-TOTAL	3,193	10,421	393	179	14,186

<u>Property Crimes</u>					
OFFENSE GROUP					
BURGLARY 1ST	776	2,519	89	39	3,423
BURGLARY 2ND	455	1,786	169	84	2,494
GRAND THEFT	108	697	62	28	895
PETTY THEFT WITH PRIOR	344	2,099	219	131	2,793
RECEIVING STOLEN PROPERTY	164	697	90	40	991
VEHICLE THEFT	217	1,054	94	53	1,418
FORGERY/FRAUD	58	588	32	18	696
OTHER PROPERTY OFFENSES	36	117	14	3	170
SUB-TOTAL	2,158	9,557	769	396	12,880
<u>Drug Crimes</u>					
OFFENSE GROUP					
CS+ POSSESSION	650	4,836	521	305	6,312
CS+ POSSESS FOR SALE, ETC.	288	2,103	71	44	2,506
CS+ SALES, ETC.	191	1,273	24	23	1,511
CS+ MANUFACTURING	28	208	1	4	241
CS+ OTHER	41	181	10	10	242
HASHISH POSSESSION	0	4	0	1	5
MARIJ. POSSESS FOR SALE	4	214	13	7	238
MARIJUANA SALES	27	132	6	5	170
OTHER MARIJUANA OFFENSES	1	22	0	1	24
SUB-TOTAL	1,230	8,973	646	400	11,249
<u>Other Crimes</u>					
OFFENSE GROUP					
ESCAPE	5	55	6	1	77
DRIVING UNDER THE INFLUENCE	42	336	24	6	408
ARSON	25	107	5	2	139
POSSESSION OF WEAPON	365	1,428	196	48	2,037
OTHER OFFENSES	139	774	47	25	985
SUB-TOTAL	586	2,700	278	82	3,646

APPENDIX B5

APPENDIX B5

PREVIOUSLY PUBLISHED NUMBERS MAY DIFFER BECAUSE OF MODIFICATIONS TO THE DATABASE.

JUL 16 2002

No. 01-1127

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

BILL LOCKYER, ATTORNEY GENERAL OF CALIFORNIA,

Petitioner,

v.

LEANDRO ANDRADE,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The amicus curiae will address the following question:

Whether the imposition of a life sentence with no possibility of parole for 50 years for the theft of nine videotapes violates the Eighth Amendment's prohibition against cruel and unusual punishment.

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Dan Lungren, Our Tough Law Works, USA Today, February 24, 1997, p. 10A. ..... -15-

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INTEREST OF THE AMICUS CURIAE

With a membership of well over three thousand public and private defenders, the California Public Defenders Association ("CPDA") is the largest association of defense counsel in California. Its members are involved in the representation of criminal defendants, including those charged under the Three Strikes and You're Out law, throughout the state of California. The CPDA has assisted this Court with amicus briefing over the last two decades, most recently in United States v. Knights, 534 U.S. 112 (2001).[1]

STATEMENT

In 1995, respondent Leandro Andrade shoplifted nine videotapes worth a total of $153.54 from two Southern California Kmart stores. Andrade was subsequently convicted of two counts of "petty theft with a prior"pursuant to California Penal Code § 666. The jury further concluded that he had been twice previously convicted of burglary and Andrade was then sentenced by the court to two consecutive indeterminate life terms pursuant to California's Three Strikes and You're Out Law ("Three Strikes law"). He will not be eligible for parole until 2046 at which time he will be 87 years old.

California's Three Strikes law is contained in California Penal Code §§ 667; 1170.12.[2] One of the law's unique features

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[1] This brief was written entirely by counsel for amicus without assistance or contributions from any party. The parties gave written consent to the filing of this brief.

[2] The latter is the text of the ballot initiative approved by California's voters in 1994 as Proposition 184; the former is the text

(continued...)

is that its increased punishment provisions are triggered by conviction for any felony. Cal. Pen. Code §§ 667(c); 1170.12(a). If a defendant has previously been convicted of a single serious or violent felony,[3] he is to be sentenced under the law's "second strike" provision to "twice the term otherwise provided as punishment for the current felony conviction." Id. at §§ 667(e)(1);1170.12(c)(1). If a defendant has been twice convicted of a serious or violent felony, he is to be sentenced for his "third strike" to an indeterminate life sentence with a minimum term equal to the greater of: "three times the term otherwise provided as punishment for each current felony conviction"; twenty five years; or the term otherwise specified by law. Id. at §§ 667(e)(2); 1170.12(c)(2). The law further mandates that a defendant convicted of more than one subsequent crime not committed on the same occasion shall be sentenced consecutively for that conduct. Id. at §§ 667(c)(6); 1170.12(a)(6).

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[2](...continued)
of the law passed the same year by the state legislature and signed by Governor Pete Wilson. The provisions of the two statutes are essentially identical.

[3] Violent and serious felonies are defined in Cal. Pen. Code §§ 667.5 and 11[illegible].7(c), respectively. These crimes include: murder, rape, robbery, kidnapping, first degree burglary, providing controlled substances to minors, and other significant felonies.

SUMMARY OF THE ARGUMENT

While this Court has held that direct proportionality between offense and punishment is not constitutionally required, a sentencing authority violates the Eighth Amendment's prohibition against cruel and unusual punishment when it imposes "extreme sentences that are 'grossly disproportionate' to the crime." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (quoting Solem v. Helm, 463 U.S. 277, 288 (1983)). In determining whether a particular sentence is grossly disproportionate, a reviewing court must evaluate: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Helm, 463 U.S. at 292.

The purpose of this brief is to bring to the Court's attention additional information regarding each of Mr. Andrade's three main assertions in his brief on the merits, namely: (1) that the imposition of a life sentence with no possibility of parole for fifty years upon conviction for two minor property offenses raises an obvious presumption of gross disproportionality; (2) that the punishment visited upon Mr. Andrade is not consistent with other punishments doled out by the state of California; and (3) that the punishment received by Mr. Andrade is not consistent with penalties imposed by other states on similar recidivist offenders. In particular, this brief surveys the available empirical evidence regarding the application of the Three Strikes law by prosecutors, the characteristics of those sentenced under the law and the effect, if any, that the law's enforcement has had on crime in

California.

ARGUMENT

I. BECAUSE THE THREE STRIKES LAW PRECLUDES EXAMINATION OF THE SERIOUSNESS OF THE TRIGGERING OFFENSE, IT PRODUCES GROSSLY DISPROPORTIONATE RESULTS.

A. The Law Is Written In a Way That Leads to Disproportionate Results

This Court has stated that while a state may punish a recidivist offender more seriously than it does a first time offender, Rummel v. Estelle, 445 U.S. 263, 285 (1980), the sentence imposed must be based primarily upon the defendant's "principal felony -- the felony that triggers the life sentence -- since [the defendant] already has paid the penalty for each of his prior offenses." Helm, 463 U.S. at 296 n.21. Almost by definition, California's Three Strikes law fails this test. The Three Strikes law indiscriminately imposes the same penalty -- an indeterminate life sentence -- on *all* felons regardless of their triggering offense if they have two or more prior serious or violent offenses on their criminal record.[4] As a result,

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[4] In sharp contrast, the "second strike" provision of the California statute explicitly takes the seriousness of the defendant's triggering offense into account, sentencing a "second strike" offender to a term equal to twice the presumptive term for this instant offense. Cal. Pen. Code §§ 667(e)(1); 1170.12(c)(1). Thus, the "second strike" provision, unlike the "third strike" provision, takes into account both the seriousness of the defendant's criminal history *and* the (continued...)

defendants, such as Mr. Andrade, whose Three Strikes sentences are triggered by the least serious offenses punishable as felonies under the California Penal Code, are punished as severely as those whose triggering offenses are serious or violent felonies.[5]

The fact that California's Three Strikes statute renders the seriousness of the defendant's instant offense irrelevant leads to truly remarkable, counterintuitive results. For example, had Mr. Andrade committed his crimes in the reverse order – that is, had his prior offenses been petty thefts and his instant offenses been burglaries rather than vice-versa – he would not be eligible for punishment under the Three Strikes Law. See, e.g., Franklin E. Zimring, et. al, Punishment and Democracy 10, Table 1.2 (2001). In other words, under the Three Strikes law, a defendant whose offenses become *less* serious over time is punished more severely than one whose offenses become *more* serious over time. Furthermore, had Mr. Andrade committed brutal rapes instead of burglaries as his

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[4](...continued)
seriousness of his triggering offense.

[5] Petitioner argues that other sentencing provisions mitigate the unfairness of the Three Strikes law by enhancing the sentences of those convicted of serious or violent third strikes. See Brief for Petitioner at 21-22. That some third strike offenders might receive indeterminate life sentences with no possibility of parole for seventy-five years is only partially relevant to whether an indeterminate life sentence with no possibility of parole for fifty years is cruel and unusual on these facts. Mr. Andrade is nonetheless serving a long, indeterminate sentence triggered by a minor offense, a sentence greater than other, more serious offenders receive in California and greater than Mr. Andrade would have received elsewhere.

prior offenses, *he would not even be eligible for prosecution as a felon*, as his triggering offense, petty theft, may be treated as a felony under California law only if he has been previously convicted of a property offense.[6] If his priors had been violent rather than property offenses, Mr. Andrade could have been sentenced to *at most* one year confinement, or exactly one-fiftieth the *minimum* term he must now serve..

B. The Sentence Imposed in This Case is Grossly Disproportionate

In this case, the Three Strikes law's one-size-fits-all sentencing has lead to a grossly disproportionate sentence. Leandro Andrade, who has never committed, threatened, or attempted a crime of violence, received an indeterminate life sentence for a crime that the California legislature has decided may be punished by confinement for under a year in a county jail. Id. While petitioner argues that petty theft with a prior is "classifiable as a felony" and that this "determination is no different than the legislature's determination that the theft of property exceeding a value of $400 is a felony" (Brief for Petitioner at 13), petty theft with a prior is quite different from

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[6] See Cal. Pen. Code § 666:

> Every person who, having been convicted of petty theft, grand theft, auto theft . . . burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

any other felony in California.

The difference resides in the fact that petty theft with a prior is a "wobbler," an offense that the California Legislature has determined may be punished either as a misdemeanor or as a felony at the discretion of the prosecuting attorney and the court. See, e.g., Cal. Pen. Code § 17(b); People v. Terry, 47 Cal. App. 4th 329, 332 (1st Dist. 1996). Thus, Mr. Andrade's conduct was, *by the determination of the legislature*, less serious than that of run-of-the-mill felons, as evidenced by the fact that prosecutors were given the option of prosecuting that conduct as a crime punishable by confinement to a county jail for a term of days rather than in the state prison for a term of years.

Notwithstanding the non-violent nature of Mr. Andrade's triggering crime, and the fact that the legislature has determined that his crime was one that could be punished adequately by confinement in a county jail, there are only two punishments more serious than the indeterminate life sentence actually imposed upon respondent: life without possibility of parole and death. Even when the Mr. Andrade's prior criminal history is taken into account, the fact remains that a man who has never committed a crime against a person, never committed a crime of violence, is being punished more severely than all but a handful of California felons.

C. The Number of Non-Violent Criminals Serving Indeterminate Life Terms is Immense.

Not only is the statute written in a way that makes disproportionate results possible, and not only is the result in

this case disproportionate, but the evidence also reveals that large numbers of non-violent, non-serious offenders are being sentenced to indeterminate life terms under the law's provisions.

The state of California's own data makes this point eloquently. After eight years of the law's application, more than 7,000 men and women are serving indeterminate life sentences in California, many of them triggered by relatively minor crimes. California Department of Corrections, Data Analysis Unit, Second and Third Strikers in the Inmate Population (March 31, 2002) at http://www.cdc.state.ca.us/pdf/strike0q302.pdf. In fact, fewer than half of those serving indeterminate life terms under the law have been sentenced for a Third Strike that involved a crime of violence. Id. (finding that forty-five percent of those sentenced under the law were sentenced for a crime against persons.). According to the California Department of Corrections, 2,158 of the 7,167 Third Strikes prison inmates in California (30%) are imprisoned for non-violent property offenses including 344 for petty theft with a prior, 164 for receiving stolen property, and 217 for auto-vehicle theft. Id. More inmates are serving life terms under the Three Strikes law for simple possession of a controlled substance (650) than for murder, manslaughter, and rape *combined* (430). Id.

Mr. Andrade's case is, thus, not an isolated one. While the facts of his case make his sentence particularly egregious, his case is merely emblematic of how a law sold to the voters as a measure to remove California's most serious and violent offenders from the streets is being used to incapacitate relatively minor offenders for extremely long, indeterminate sentences.

II. AN INTERSTATE COMPARISON OF RECIDIVIST LAWS INDICATES THAT CALIFORNIA'S STATUTE IS EXTREME AND WITHOUT PEER.

This Court has held that the meaning of the Cruel and Unusual Punishment Clause of the Eighth Amendment is not fixed, but rather "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). In its most recent Eighth Amendment decision the Court re-iterated its long-standing position that the legislative enactments of the several states provide the "clearest and most reliable objective evidence of contemporary values." Atkins v. Virginia, 122 S.Ct. 2242 (2002) (citing Penry v. Lynaugh, 492 US. 302, 331 (1989)). Furthermore, the Court has held that the proper time frame in which to evaluate contemporary values is by looking at "those that currently prevail." Atkins, 122 S.Ct. at 2247.

Nearly every state currently has a law on its books that could be described as a Three Strikes or recidivist law. However in most cases, these laws share little with California's Three Strikes law except for their names; both the fact that the California law is triggered by any additional felony and that a life sentence may be imposed on a defendant with no history of violence place it at the extremes of criminal punishment in this country.

The majority of states with recidivist laws on their books require that the triggering offense or at least one prior offense be violent or serious before their most serious provisions can be imposed. See, e.g., Ark. Code Ann. § 5-4-

501 (Michie 1987) (a defendant convicted of a felony involving violence who has been previously convicted of one or more serious felonies involving violence is to be sentenced to a period of not less than 40 years nor more than 80 years); Conn. Gen. Stat. § 53a-40 (2001) (a defendant who has both a current and prior violent offense is considered a persistent dangerous felony offender and shall be sentenced to life imprisonment); Ga. Code Ann. § 17-I0-7 (2001) (same criteria trigger a sentence of life without parole); Ill. Comp. Stat. 5/33B-1 (2001) (conviction of a third violent felony triggers life imprisonment); Ind. Code § 35-50-2-8.5 (2001) (a defendant with two priors subsequently convicted of a violent felony may be sentenced to life imprisonment if convicted of a third such offense); La. Rev. Stat. Ann. § 15:529.1 (West 2001) (life term imposed for a fourth felony conviction if the current felony and at least 2 of the prior felonies are crimes of violence); Mass. Gen. Laws Ann. ch. 279 § 25 (West 2001) (conviction of a fourth violent offense produces a life term); Md. Code Ann. Art. 27, § 643B (2001) (a defendant convicted of a fourth crime of violence shall receive life imprisonment); Minn. Stat. § 609.1095 (2001) (a defendant convicted of a third violent offense shall be sentenced to at least the presumptive sentence for the instant offense); Miss. Code Ann. § 99-19-83 (2001) (a third time felon shall receive life imprisonment if either the instant offense was violent or two of his prior offenses were violent); Mont. Code Ann. § 46-18-219 (2001) (life imprisonment for conviction of a second most violent offense or a third violent offense)[7]; N.J. Stat. Ann. § 2C:43-7.1 (West 2002) (a defendant whose instant offense is violent and who has twice been

[7] Compare Mont. Code Ann. § 46-18-502 (2001) (range of not less than 5 or more than 100 years imprisonment for second felony conviction without regard to seriousness of instant offense).

convicted of crimes of violence shall receive life imprisonment); N.M. Stat. Ann. § 31-18-23 (Michie 1978) (same); N.Y. Penal Law § 70.08 (McKinney 2002) (second violent offense triggers a higher sentencing range for the instant offense)[8]; N.C. Gen. Stat. § 14-7.7 (2001) (a defendant convicted of a second crime of violence shall receive an increased term on his instant offense); Ohio Rev. Code Ann. § 2929.01 (West 2002) (second violent offense triggers increased sentencing); 42 Pa. Cons. Stat. Ann. § 9714 (West 2002) (a defendant convicted of a third crime of violence shall be sentenced to at least 25 years imprisonment); Tenn. Code Ann. § 40-35-120 (2001) (conviction of a third violent offense shall result in life imprisonment); Vt. Stat. Ann. tit. 13 § 11a (2001) (a defendant convicted of a third violent offense may receive a life term); Va. Code Ann. § 19.2-297.1 (Michie 2002) (same); Wyo. Stat. Ann. § 6-10-201 (Michie 1977) (a defendant convicted of an instant violent offense with 3 prior felonies shall be sentenced to life imprisonment).

Other states require that the triggering offense be serious before permitting their most severe sentencing provisions to be imposed. See, e.g., Iowa Code Ann. § 902.8 (West 2002) (a defendant convicted of a serious felony who has twice been convicted of any felony shall be confined for a minimum of three years); Okla. Stat. Tit. 21 § 51.1 (2001) (10-years-to-life term triggered only if third felony is punishable by five years or more imprisonment); S.C. Code Ann. § 17-25-45 (Law. Co-op. 2002) (conviction of a second most serious offense shall result in life imprisonment); Wash. Rev. Code §§

[8] Compare N.Y. Penal Law § 70.10 (McKinney 2002) (third conviction for any felony results in imprisonment for a class A felony).

9.94A.570, 9.94A.030 (2002) (conviction of a third most serous offense triggers life sentence).

Another group of states has a calibrated system whereby the severity of the recidivist sentence is measured by the severity of the current offense and the number and severity of prior offenses. See, e.g., Ala. Code § 13A-5-9 (1975) (sentence calibrated to the severity of the instant offense and the number of priors); Alaska Stat. §§ 12.55.125, 12.55.145 (2001) (same); Ariz. Rev. Stat. § 13-604 (2001) (same); Colo. Rev. Stat. § 16-13-101 (2002) (same); Fla. Stat. Ann. § 775.084 (2001) (same); Haw. Rev. Stat. § 706-606.5 (2001) (calibrating penal severity to the seriousness of the instant offense); Kan. Stat. Ann. § 21-4504 (2001) (imposing a sentence multiplier based upon the number of prior convictions); Ky. Rev. Stat. § 532.080 (2001) (sentence calibrated to the number of priors and the severity of instant offense); Mich. Comp. Laws Ann. § 777.21 (West 2002) (upper limit of minimum sentence increased based on the number of priors); Me. Rev. Stat. Ann. tit. 17-A §1252 (West 2002) (increasing the class of the instant offense); Mo. Rev. Stat. § 558.016 (2002) (sentence calibrated by the severity of the instant offense); Neb. Rev. Stat. § 29-2221 (2001) (imposing a sentencing range based upon the severity of current and/or prior offenses); N.H. Rev. Stat. Ann. § 651:6 (2001) (fixing the punishment for the instant offense based on the severity of same); N.D. Cent. Code § 12.1-32-09 (2001) (calculating the defendant's sentence based upon the severity of the instant offense for an offender with two felonies punishable by at least 5 years imprisonment); S.D. Codified Laws § 22-7-7 (2002) (class of offense increased to next higher class); Tex. Penal Code Ann. § 12.42 (2001) (sentence calibrated by the severity of the instant offense and the number of prior offenses); Utah Code Ann.§ 76-3-203.5 (2001)

(conviction of a third violent offense increases the class of instant felony); Wis. Stat. § 939.62 (2001) (calibrated increase in maximum term based upon severity of same).

Finally, California finds itself among those few states that permit the imposition of a life term regardless of the seriousness of the instant offense and in the absence of a previous showing of violence. See, e.g., Del. Code Ann. tit. 11 § 4214 (2001) (discretionary life term for any third felony); Idaho Code § 19-2514 (Michie 2001) (imprisonment for 5-years to life upon third conviction for any felony); Nev. Rev. Stat. § 207.010 (2002) (third conviction of any felony invokes sentencing options ranging from 25 years to life imprisonment without parole; W. Va. Code Ann. § 61-11-18 (Michie 2002) (third conviction of crime punishable by confinement in penitentiary results in life sentence).[9]

Even among this tiny minority of states, California finds itself standing alone: of these states, only California would treat the theft of less than $200 as a felony.[10] Thus, even among

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[9] See also, R.I. Gen. Laws § 12-19-21 (2001) (any third felony conviction produces sentence of not more than 25 years);

[10] See, Del. Code tit. 11 § 840(d) (2001) (Except where the victim is 62 years or older, or an "infirm adult" or a disabled person, "theft is a class A misdemeanor unless the value of the property received, retained, or disposed of is $1,000 or greater, in which case it is a class G felony."); Idaho Code § 18-2407 (Michie 2001) (theft of $1,000.00 or less is petit theft, unless committed in one of the enumerated ways, none of which is applicable here); Id. § 18-2408 ("Petit theft is a misdemeanor . . . ."); Nev. Rev. Stat. § 205.0835(2) (2002) ("If the value of the property or services

(continued...)

these states with the nation's broadest recidivist statutes, only California would impose a life term on a defendant with Mr. Andrade's criminal history. In fact, amicus was unable to locate a state other than California where Mr. Andrade could have received a life term for his conduct.

While the states are generally free to determine the punishment merited by each crime, and while interstate variation in penal severity is both expected and appropriate, the above inter-jurisdictional analysis in this case indicates that California's punishment of non-violent offenders such as Mr. Andrade is simply not in line with contemporary understandings of decency. See Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

III. THE LAW HAS NOT DEMONSTRATED A SIGNIFICANT IMPACT ON CRIME RATES

In 1998, the California Attorney General's Office issued a report entitled: "Three Strikes and You're Out" - Its Impact on the Criminal Justice System After Four Years in which it implied that a drop of nearly 27 percent in violent crime and

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[10](...continued)
involved in the theft is less than $250, the person who committed the theft is guilty of a misdemeanor . . . ."); State v. Deal, 358 S.E.2d 226, 231 (W.Va. 1987) (finding that a recidivist sentence triggered by a non-violent offense violates the state's guarantee of proportionality in sentencing.).

more than 30 percent in six major crime categories was attributable to the passage of the Three Strikes law four years earlier. Similar claims were made in editorials by California's Attorney General and Governor. See, e.g., Dan Lungren, Our Tough Law Works, USA Today, February 24, 1997, p. 10A; Pete Wilson, "Three Strikes" Law Truly Makes California Safer, Los Angeles Daily News, March 9, 1997, p. V-3.[11]

As intuitively appealing as these arguments may seem, careful analysis calls them into serious doubt. For example, in the only book-length empirical analysis of the California Three-Strikes law, the authors found that such grandiose claims of crime reduction are simply not borne out by the evidence. Zimring, et. al, at 85-105 (2000). The authors showed that while it is true that crime in California dropped after the law went into effect, crime rates in California's largest cities (for which the best month-by-month data are available) began falling more than two years *before* the Three-Strikes law went into effect and continued falling, at virtually the same rate, in the years *after* the law went into effect. Id. at 88, Figure 6.1. While such a steady drop in crime rates neither proves nor disproves a causal relationship between the law's implementation and the prevalence of crime, it certainly points out the dangers of attributing all post-Three Strikes crime reduction to the law's passage.

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[11] Such claims have continued to the present. See, Brief of Amicus Curiae California District Attorney's Association in Support of Petitioner at 24, n. 35 ("The change to a penological theory of incapacitating habitual criminals appears to have worked. California has enjoyed a 41% drop in its crime rate since it adopted the 'Three Strikes' laws in 1994, while the rest of the country experienced a decline of only 19%.").

Petitioner argues that "a large percentage of crime is committed by a relatively small number of repeat offenders; six percent of the criminal population commits sixty to seventy percent of all crime." Brief for Petitioner at 17. While it is possible that such a group exists, the available evidence demonstrates that the offending cohort singled out for "third strike" punishment is simply not such a group. For example, by examining the criminal histories of those arrested for crimes in California both before and after the Three Strikes law went into effect, Zimring, et. al determined that those eligible for "third strike" punishment were responsible for just 3.3 percent of California crime before the law went into effect and 2.7 percent of crime after the law's passage. Id. at 94-99. Based on this evidence, the authors concluded that the crime reduction attributable to the passage of the Three Strikes was, at most, on the order of one percent, rather than the double digit reductions claimed by the law's proponents. Id.

Furthermore, according to the same study, those with a criminal history that would qualify them for Three Strikes punishment are actually *less* likely to be arrested for a crime of violence than are those ineligible for punishment under the Three Strikes law. Id. at 49, Table 4.2. While those eligible for Three Strikes punishment generally have more extensive criminal histories than those not eligible for such punishment, much of that difference is attributable to the fact that Three Strikes eligible defendants are older (and therefore closer to the end of their criminal careers) than are those without strikes on their criminal records. Id. at 50, 56, Table 4.4.

Despite this evidence that the Three Strikes law is not having the promised salutary effect on crime rates, attempts to produce an official study of the law's impact have been

unsuccessful. In 1999, Governor Gray Davis vetoed Senate Bill 873 which would have authorized and funded a study into the costs and benefits of the five-year old legislation. Assuming without proof that the law was working as it had been intended, the governor vetoed the bill stating that "an additional study is unlikely to produce much, if any, useful information that is not already available." Id. at 222. Yet this conclusion is by no means borne out by the evidence just cited.

CONCLUSION

The opinion of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted on this fifteenth day of July, 2002,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BILL LOCKYER,
ATTORNEY GENERAL OF CALIFORNIA,

Petitioner,

v.

LEANDRO ANDRADE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* FAMILIES TO AMEND CALIFORNIA'S THREE STRIKES AND CONGRESS OF CALIFORNIA SENIORS IN SUPPORT OF RESPONDENT

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Interest of *Amici Curiae*[1]

Amici are concerned citizens, family members, and friends of persons sentenced under California's Three Strikes Law for non-violent low-level offenses. *Amici* share with all Californians a steadfast concern for public safety and fervent desire to reduce crime. But while *amici* are sympathetic to the impulse to "do more" to fight crime, we are deeply troubled by the grossly disproportionate sentences that have flowed from the wide net cast by California's Three Strikes Law. For reasons we explain herein, our experience convinces us that California's sentencing scheme stands as an anomaly within the nation and is deserving of a proportionality review by this Court.

Amicus curiae Families to Amend California's Three Strikes ("FACTS") is a California-based organization begun in 1996 dedicated to reforming California's Three Strikes Law to bring it into conformity with the so-called "three strikes" laws of the other states by restricting its application to violent offenders only. FACTS, through its membership and more than a dozen chapters throughout California, engages in a variety of public education efforts to inform the public and policy makers about the statewide implementation and impact of Three Strikes. To this end, FACTS tracks the implementation of the Three Strikes Law, collects academic research, court opinions and news reports concerning the law, compiles the personal and family stories of individuals currently serving sentences of 25 years to life as a result of "third strike" convictions for low-level non-

[1] The parties have consented to the filing of this brief. It was not authored in any part by counsel for a party, and the Center for Policy Reform made a monetary contribution toward its preparation.

violent offenses, and helps coordinate individuals and organizations to speak out on behalf of Three Strikes reform.

Amicus curiae Congress of California Seniors ("CCS") is a non-profit advocacy organization established in 1977 dedicated to improving the quality of life for seniors and their families. As an umbrella organization for hundreds of affiliated senior groups and individuals, CCS has a combined membership of over 650,000 Californians. The broad-based CCS coalition, which includes senior centers, retired-public-employee organizations and trade unions, has emerged as a major voice for California seniors at the state capitol and beyond.

Summary of Argument

Justice Kennedy's concurring opinion in *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) identified four common principles which give content to the uses and limits of proportionality review. The first of these principles is substantial deference to the judgments of state legislatures, where substantive penological judgments are most appropriately balanced. 501 U.S. at 998-999. The second of these principles is the lack of constitutional mandate for any particular theory of punishment, noting that different weights have been accorded at different times to the often competing goals of retribution, deterrence, incapacitation and rehabilitation. 501 U.S. at 999.

The third principle values the diversity which is an inevitable result of our federal system. The mere fact that a state has the most severe punishment for a particular crime does not, by itself, render the punishment grossly disproportionate. 501 U.S. at 999-1000. The fourth principle requires that proportionality review be guided by objective factors. 501 U.S. at 1000-1001.

This brief will focus upon these four guiding principles in the context of California's "Three Strikes Law" enacted in 1994. This context is unique in several respects. Although the identical measure was enacted by both the California legislature and popular initiative, no legislative hearings were ever conducted and no penological experts were consulted in its drafting. There was no legislative compromise or amendment affecting any of its language. An emotional reaction to one horrendous crime was manipulated to present the electorate with an "all or nothing" approach to an extremely complex matrix of options.

While a legislative enactment can subsequently be amended at any time, the California constitution provides that initiative measures can only be amended by subsequent initiatives, unless the measure itself provides otherwise. Calif. Const., Art. II, Section 10(c). The "Three Strikes" initiative provides that any amendments will require a two-thirds vote of the legislature or a subsequent initiative measure. Two subsequent initiative measures have modified the "Three Strikes Law," introducing even more anomalies and contradictions.

In their Opening Brief, Petitioners suggest that "over time the attitude of the citizens of California may change. In the meantime, however, deference should be at its apex. . . ." [Pet. Opening Brief, p. 16]. Unfortunately, the super-majority or subsequent initiative requirements imbedded in the "Three Strikes Law" were deliberately designed to frustrate any efforts to ameliorate the measure. Deference is inappropriate for a setting in which laws are enacted in an emotional paroxysm without deliberation or compromise, and subsequent amendment or correction is practically precluded. The principle of deference is designed to promote the goals of federalism and our republican form of government. California's initiative process is the antithesis

of the republican form of government. In this setting, deference should be at its nadir.

The context of California's "Three Strikes Law" is also unique with regard to California's explicit recognition of a controlling theory of punishment. In 1976, California rejected an indeterminate sentencing system and adopted a determinate sentencing scheme which explicitly recognized proportionality as its goal. In Penal Code Section 1170, the legislature declared:

> [T]he purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.

This commitment to proportionality was not undermined or modified by the enactment of the "Three Strikes Law," although its operation may occasionally result in grossly disproportionate sentences, as it did in this case. Thus, in applying a constitutional standard to forbid extreme sentences that are grossly disproportionate to the crime, this Court would not be mandating adoption of a penological theory rejected by California, but actually promoting the penological theory explicitly embraced by the state.

The diversity promoted by our federal system is fully reflected in the variety of "Three Strikes" measures adopted by twenty-five states and the federal government. But with one singular exception, these measures all reflect a consistent judgment that a serious felony must be the triggering offense to justify a life sentence for a repeat offender. California stands alone in the breadth of its measure. And with one singular exception, all of these measures can be ameliorated

by subsequent amendment by a majority vote of Congress or the state legislature. California stands alone in imposing a supermajority requirement for amelioration. A ruling that grossly disproportionate sentences violate the federal constitution will not discourage diverse approaches to sentencing. It will merely insure that a "safety valve" can correct extreme injustices which may not have been fully anticipated upon enactment, but become apparent only with hindsight.

Finally, an objective standard is readily available to inform proportionality review in this case. The penalty of life imprisonment without parole differs from other forms of punishment, and the use of petit theft as a triggering offense to escalate punishment from a discretionary sentence of up to one year in the county jail to a mandatory sentence of 50 years to life in state prison is objectively extreme and grossly disproportionate to the crime.

I. The Enactment of the "Three Strikes" Law in California.

California's "Three Strikes" law has been aptly described as "an extreme example of a populist preemption of criminal justice policy making." Zimring, Hawkins & Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (Oxford Univ. Press 2001), p. 3. First proposed by Mike Reynolds, the Fresno father of a murder victim, the measure was put on the California ballot by an alliance of two groups active in lobbying for crime victims: the California Correctional Officers Association (the prison guards union) and the National Rifle Association. Willkie, "Prop. 184: 3 Strikes Already on Books, Foes Say Its Passage Only Bolsters a Bad Law," San Diego Union, Oct. 12, 1994, p. A1. The campaign for its enactment was bolstered when 12-year-old Polly Klaas was abducted from

her Petaluma home, sexually assaulted and murdered by a twice-convicted violent offender recently paroled from state prison. The case generated a media frenzy, and California's then Governor Pete Wilson, preparing for a hotly contested reelection contest against Kathleen Brown, the daughter of one former Governor and the sister of another, announced his endorsement of the Reynolds "Three Strikes" proposal at the funeral of Polly Klaas. Skelton, "Wilson Seizes the Day After Polly's Murder," Los Angeles Times, Dec. 13, 1993, p. A3.

Democrats were in control of the state legislature, and their concern that the Governor would co-opt the "tough on crime" sentiment generated by the Polly Klaas murder produced an unusual game of "chicken" between the governor and the legislature, remarkable even for California politics. Five different versions of proposals for increased sentences for repeat offenders had been introduced in the state legislature, including one identical to the Reynolds proposed initiative. Mark Klaas, the father of murder victim Polly Klaas, at first endorsed the Reynolds proposal, but later campaigned against it and endorsed a less sweeping "Three Strikes" law which was also endorsed by the California District Attorneys Association. It would have required the third strike to be a serious or violent felony, the same as the first two strikes. Hecht, "Two Grieving Fathers Part Ways on '3 Strikes' Crusade," Sacramento Bee, July 10, 1994, p. A1.

The legislative leadership announced it would pass whatever version of "Three Strikes" the Governor selected. The Governor's choice of the most extreme version, the Reynolds measure headed for the ballot in initiative form, then induced the legislature to enact legislation virtually identical to the proposed initiative, to deprive the Governor of a campaign issue. Morain, "A Father's Bittersweet Crusade, Mike Reynolds Vowed that His Murdered

Daughter Would Not Die in Vain; Few Thought He Would Win, But Today He Will See the 'Three Strikes' Bill Signed Into Law," Los Angeles Times, March 7, 1994, p. A1.

The legislative process that produced California's "Three Strikes" law was unique for the absence of analytic attention from criminal justice professionals and academic experts prior to enactment, and the complete lack of any "fine tuning" by elected power brokers in the legislature or governor's office. There were no legislative hearings and no amendments were ever proposed or considered. A proposal drafted by a special interest lobbying group with no public input literally sailed to enactment untouched by human hands. Zimring, Hawkins & Kamin, *supra* at 11-13. To some extent this was attributable to the one-time frenzy which the horror of the Polly Klaas murder injected into a contentious political campaign, but to an even greater extent it was attributable to the role that the initiative process has come to play in California government.

The displacement of elected government officials as policy makers by the California initiative process is dramatically demonstrated by Peter Schrag, an astute long-time observer of California government, in *Paradise Lost* (New Press, 1998). During the past two decades, he writes, "California has been in nearly constant revolt against representative government." *Id.* at 9-10. A long succession of broad ballot initiatives promoted by interest groups have mandated or prohibited major programs and policies, imposing supermajority requirements for legislative action.

> Paradoxically, the further the initiative process goes, the more difficult and problematic effective citizenship becomes. California has not just seen a sharp decline in the quality of public services – education, public parks, highways, water projects –

> that were once regarded as models for the nation. It has also seen the evolution of an increasingly unmanageable and incomprehensible structure of state and local government that exacerbates the same public disaffection and alienation that have brought it on, thus creating a vicious cycle of reform and frustration. Each measure, because it further reduces governmental discretion, and because it moves control further from the public – from local to state government, from the legislature to the constitution, from simple majorities to supermajorities – makes it harder to write budgets, respond to changing needs, and set reasonable priorities

Schrag, *supra* at 11-12.

The legislative enactment of the harshest version of "Three Strikes" would logically have led to abandonment of the campaign to enact the measure as an initiative. Why spend money to promote a ballot measure which the legislature has already adopted? The reason the initiative campaign proceeded, however, is precisely the reason why California's "Three Strikes" law deserves so little deference from this Court. Enactment of the initiative was sought to "protect" the measure against subsequent amelioration by legislative amendment.

The measure passed by the legislature being a word-for-word copy of the proposed initiative, it contains the "supermajority for amendment" proviso that characterizes many California initiatives:

> The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute

> that becomes effective only when approved by the electors.

Stats. 1994, ch. 12, p. 75; Calif. Pen. Code, § 667(j). The measure dispensed with the supermajority requirement, however, for legislative measures *increasing* the length of sentences. Stats. 1994, ch. 12, p. 72; Calif. Pen. Code § 667 (a) (3). In other words, subsequent legislatures could amend the law at will to make it harsher, but any ameliorative amendments would require a two-thirds majority. This attempt to limit subsequent amendment was patently invalid,[2] and its inclusion is an amusing example of how the legislature completely abandoned its normal function of drafting and debating statutory language in its haste to jump on the "Three Strikes" bandwagon. Only an initiative could achieve the desired limitation on the authority of subsequent legislatures.

The subsequently enacted initiative thus did more than "ratify" the previously enacted legislation. It enhanced its status to take full advantage of Article II, Section 10(c) of the California Constitution, which provides:

> The Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

The difficulty of mustering a two-thirds majority in the California legislature and the enormous cost of preparing, promoting and passing an initiative measure render the

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[2] A legislature cannot limit the power of amendment of a subsequent legislature, either as to the extent or manner of its exercise. SUTHERLAND STATUTORY CONSTRUCTION, § 22.2, at pp. 244-45 (6th Ed. 1996). *Cf.* 58 Cal. Jur. 3d, Statutes § 50, at p. 383 (1980).

"Three Strikes" law virtually untouchable. Only two subsequent amendments have been achieved by incorporating modifications in initiative measures designed to achieve other purposes.

On March 7, 2000, California voters approved Proposition 21, which gives prosecutors discretion to prosecute specified categories of juvenile offenders as adults without the previously required judicial approval. Calif. Welf. & Inst. Code § 602, 707 (2000). This initiative also substantially expanded the list of serious or violent felonies which count as "strikes" to make *all* defendants eligible for sentencing under the "Three Strikes" law. Calif. Pen. Code § 1192.7 (2000). The constitutionality of Proposition 21 was challenged under the requirement of California Constitution Article II, Section 8 (d) that initiative measures address a "single subject," because it combined major reforms of juvenile court procedure with an expansion of the "Three Strikes" law. That challenge was rejected by the California Supreme Court in *Manduley v. Superior Court,* 27 Cal.4th 537 (2002). The California Supreme Court has invalidated only one initiative for violating the "single subject" rule since that requirement was added to the California constitution in 1948. Uelmen, *Handling Hot Potatoes: Judicial Review of California Initiatives After* Senate v. Jones, 41 Santa Clara L. Rev. 999 (2001).

On November 7, 2000, the California electorate enacted Proposition 36, which mandates that drug offenders convicted of simple possession be placed on probation and put in drug treatment programs. Calif. Health & Safety Code § 1210, 1210.1 (2001). A defendant is excluded from Proposition 36 if he has been previously convicted of a serious or violent felony, unless there has been a period of more than five years in which the defendant remained free of prison custody and was not convicted of any felony offense

other than a nonviolent drug possession offense or of any misdemeanor involving threatened or actual physical injury to another person. Calif. Health & Safety Code § 1210.1(b)(1). But for Proposition 36, a non-excluded defendant with a prior conviction of a serious or violent felony would receive a mandatory prison sentence under the "Three Strikes" law, and receive life imprisonment if he had two such priors. As of February 28, 2001, 637 persons have received life sentences under the "Three Strikes" law for a third felony offense of possession of a small amount of drugs. California Assembly Committee on Public Safety, *Committee Analysis of A.B. 1652,* 2000-01 Leg., at 3 (Cal. Apr. 24, 2001). This has created serious disparity in the treatment of many drug offenders in California. If a defendant had two serious prior felonies, regardless of how old the convictions were, and he was convicted of drug possession prior to July 1, 2001 (the effective date of Proposition 36), he was sentenced to life imprisonment. The same defendant, if five years had elapsed since he served time for his priors, would automatically be sentenced to probation under Proposition 36. This disparity led at least one California court to declare that Proposition 36 must be applied retroactively to avoid a constitutional problem of denial of equal protection of the laws. *People v. Fryman,* 97 Cal.App.4th 1315 (2002).

II. Deferring to the Legislative Process That Produced California's "Three Strikes" Law Would Undercut The Constitutional Guarantee of a Republican Form Of Government.

Article IV, Section 4 of the United States Constitution provides:

> The United States shall guarantee to every state in this Union a Republican Form of Government. . . .

This guarantee reflects a fundamental commitment to representative government, as contrasted with the "pure democracies of Greece." THE FEDERALIST, No. 63, at 428 (J. Madison). Placing lawmaking power in the hands of elected representatives insures that legislation is the product of a deliberative process which offers "time for reflection, exposure to competing needs, and occasions for transforming preferences." Eule, *Judicial Review of Direct Democracy,* 99 Yale L.J. 1503, 1527 (1990).

Amici do not contend that the initiative process itself, as it exists in most states that permit it, is a repudiation of the republican form of government. In most of these states, laws enacted by initiative are treated the same as laws enacted by the legislature; they may be subsequently amended or repealed by the legislature. California, however, has gone a step beyond this concept of shared legislative power. In California, an initiative enactment is given an elevated, exalted status that places it beyond the reach of the ordinary power of the legislature. Under the California constitution, an initiative statute becomes as difficult to amend or repeal as a constitutional provision. The initiative statute which enacted California's "Three Strikes" law provides:

> The provisions of this measure shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

Initiative Measure No. 184, Section 4, Stats. 1994, at p. A-317. Thus, amelioration of the unusually harsh sentences mandated by the "Three Strikes" law cannot be achieved by the ordinary legislative process. A supermajority must be

assembled, or a new initiative campaign must be financed and mounted.

It is precisely this feature of California initiatives that renders them anti-republican. In the earliest state court opinion upholding the initiative and referendum process, the Oregon Supreme Court defended lawmaking by plebiscite only to the extent that it did not interfere with the continued authority of elected representatives. *Kadderly v. City of Portland,* 74 P. 710, 720 (Or. 1903). This meant that ordinary laws could not be put beyond legislative reach, by placing them in the state's constitution or by other special obstacles to later legislative action. Linde, *State Courts and Republican Government,* 41 Santa Clara L. Rev. 951, 963 (2001).

In 1912, this Court dismissed a challenge to an Oregon initiative which claimed the enactment of a tax by the initiative process violated the guarantee of a republican form of government. *Pacific States Telephone & Telegraph Co. v. Oregon,* 223 U.S. 118 (1912). The Court read the words "The United States" in the Guarantee Clause to place the onus for keeping state governments republican on the federal political branches rather than the federal courts. This allocation of federal power rendered the guarantee "not justiciable" in the Supreme Court. 223 U.S. at 151. This ruling should pose no obstacle, however, when the issue presented is the degree of deference this Court should give to the laws enacted by an initiative process which limits subsequent action by the legislature. Although speaking in broader terms, the late Professor Julian Eule succinctly put the argument:

> In the end, my claim is that direct democracy is constitutionally suspect, not impermissible. It triggers a harder judicial look. This argument is not

> hampered by the justiciability problems that surround the republican form clause, for I do not contend this clause should be the lens under which direct democracy will be scrutinized. My argument instead is that when laws enacted by plebiscite are challenged under *other* provisions of the federal constitution, the republican form clause informs the nature of the judicial role.

Eule, *supra* at p. 1545. *Amici* do not advocate heightened scrutiny for *all* laws enacted by initiative, however, as does Professor Eule. We limit our argument to initiatives which disarm elected legislatures from subsequent amelioration. This approach particularly recommends itself when the constitutional lens through which legislation is being scrutinized is the prohibition of cruel and unusual punishment in the Eighth Amendment. The fundamental balancing of competing penal policies and theories, and the tempering of inflamed passions, is particularly suited to the deliberative process of representative government. As noted in Justice Kennedy's concurring opinion in *Harmelin, supra* at 998:

> Determinations about the nature and purpose of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law and the social order. "As a moral or political issue [the punishment of offenders] provokes intemperate emotions, deeply conflicting interests, and intractable disagreements." D. Garland, Punishment and Modern Society 1 (1990).

These words echo a theme which runs throughout The Federalist. "[T]here are particular moments in public affairs," Madison opined in The Federalist No. 63, "when the

people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will be the most ready to lament." THE FEDERALIST, No. 63 at 425; *see also id.*, No. 10 at 60-61; No. 49 at 343; No. 71 at 482. California's "Three Strikes" law was clearly responsive to "irregular passion" aroused by a horrendous crime and artful politicians. As noted in Petitioner's Opening Brief (p. 16), the citizens of California may, at some point, lament the severity of their response. The problem with the California initiative process, however, is that lamentation encounters greater legislative obstacles than the original passion. Representative or republican government is stymied.

This, of course, is not the first case in which this Court has reviewed the constitutionality of state laws enacted by popular initiative. That case was *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), where the Court invalidated an Oregon initiative inspired by the Ku Klux Klan which imposed criminal penalties upon parents who sent their children to parochial schools. Subsequent cases have subjected initiative measures to strict scrutiny, not because they were enacted by initiative, but because they involved racial discrimination or impinged upon First Amendment rights. *E.g., Romer v. Evans,* 517 U.S. 620 (1996) [Referendum Measure permitting discrimination against gays and lesbians]; *Washington v. Seattle School Dist. No. 1,* 455 U.S. 457 (1982) [Initiative Measure prohibiting school busing to achieve desegregation of schools]; *Reitman v. Mulkey,* 387 U.S. 369 (1967) [Initiative Measure permitting racial discrimination in sale or leasing of real property]. This is, however, the first case in which Eighth Amendment proportionality review is sought for a criminal sentencing measure enacted by popular initiative. Traditional deference to the state legislative process is especially inappropriate

when the process impairs the normal protections of our republican form of government. In this setting, the judiciary stands *alone* in guarding against the evils incident to transient, impassioned majorities the the constitution seeks to dissipate. Eule, *supra* at p. 1525.

III. Proportionality Review is Fully Consistent With California Penological Theory.

There need be little concern in this case that proportionality review will impose a penological theory of punishment upon California that is in any way inconsistent with current and prevailing theories embraced by the state. California's "Three Strikes" law did not explicitly embrace any theory of punishment, other than to lock up felons as long as possible. The purpose of the law is stated in its first paragraph:

> It is the intent of the People of the State of California in enacting this measure to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

Stats. 1994, ch. 12, p. A-314. Imposing greater punishment on recidivists can be justified by any or all of the competing theories of the purpose of punishment: retribution, deterrence, incapacitation, and even rehabilitation. California's "Three Strikes" law did not offer any of these justifications, but simply and forthrightly declared its purpose to be "greater punishment" for certain repeat offenders. This is fully consistent with, and must be construed in conformity with, prior declarations of the

purpose of punishment contained in California law. The most direct declaration of the purpose of punishment found in California law is contained in Section 1170 of the California Penal Code, adopted in 1976:

> [T]he purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.

A commitment to proportionality of punishment is also embedded in the California constitution, which contains a prohibition of "cruel *or* unusual punishment." Calif. Const., Art. I, Section 17. In *People v. Anderson,* 6 Cal.3d 628 (1972), the California Supreme Court seized upon the disjunctive nature of this prohibition to declare California's death penalty law unconstitutional. The constitution was later amended to declare that the death penalty is "neither cruel nor unusual punishment," Calif. Const., Art. I, Section 27, but the prohibition is still stated in the disjunctive. In numerous cases, the California Supreme Court has construed this clause to impose a requirement of proportionality in sentences of imprisonment. *In Re Lynch,* 8 Cal.3d 410 (1972); *In Re Foss,* 10 Cal.3d 910 (1974); *In Re Grant,* 18 Cal.3d 1 (1976).

Thus, there is little or no risk that applying constitutional proportionality review to sentences imposed under California's "Three Strikes" law will impose a penological theory that California has rejected. California has embraced proportionality as the principal goal of its sentencing laws in both its constitution and its Penal Code, and the "Three Strikes" law is fully consistent with that goal.

IV. Proportionality Review of California's "Three Strikes" Law Would Not Impair the Values of Our Diverse Federal System.

Between 1993 and 1996, twenty-five states and the federal government all adopted some form of legislation utilizing the popular baseball metaphor, "Three Strikes and You're Out." Clark, Austin & Henry, *Three Strikes and You're Out: A Review of State Legislation,* Nat'l Institute of Justice, Washington, D.C. 1997. The impact of most of these laws has been symbolic. A 1998 survey revealed that fourteen states had sentenced fewer than ten defendants under their "Three Strikes" laws, the entire federal system had sentenced thirty-five, and no state except California had accumulated more than 1,000 "Three Strikes" sentences. In California, 40,000 defendants had been sentenced under the new law. Campaign for an Effective Crime Policy, *"Three Strikes" Laws: Five Years Later,* Washington, D.C., 1998.

The primary reason for the huge impact of the California law was the unique breadth of its coverage. Only one prior qualifying felony is necessary before expanded and mandatory imprisonment is required, and a third strike sentence of life imprisonment is invoked by any triggering felony conviction, including petit theft if a prior felony conviction is present. Other "Three Strikes" laws only aggravate penalties after two prior strikes and require at least a serious felony theft conviction to trigger the third-strike penalties. Clark, Austin & Henry, *supra.*

California stands alone in permitting any felony to serve as the triggering offense. One consequence of this overbreadth is that many relatively minor transgressions are swept up in the California Penal Code's classification of felonies to include "wobblers": offenses that can be treated as either a felony or a misdemeanor. Thus, in this case, a

petit theft ordinarily punishable by up to one year in the county jail was escalated to a felony because of the defendant's prior conviction, then the felony was escalated to a third strike to mandate a life sentence. While we might value the diversity of a federal system that allows California to stand alone, the imposition of a minimal constitutional standard will hardly impede further experimentation by the states. It might actually encourage experimentation by insuring that unforeseen excesses can still be remedied.

If the purpose of our federal system is to permit diverse experimentation by the states, the states must accept the responsibility to monitor their experiments and intervene to ameliorate unanticipated injustices. Every "Three Strikes" law adopted by 24 states and Congress can be modified or amended by a majority vote of the legislature. California also stands alone in imposing a supermajority requirement for amelioration. The value we attach to diversity should not extend to states which turn a blind eye to the possibility that their experiments may run awry. We should recognize the baseball wisdom of Yogi Berra, who observed, "Foresight is always better, afterward." 39 Authors, *The Jurisprudence of Yogi Berra,* 46 Emory L.J. 697, 727 (1997). In California, the value of delayed foresight is rejected by a rule demanding a supermajority to perform any fine tuning of the experiment.

V. Proportionality Review of California's "Three Strikes" Law Can Be Guided By An Objective Standard That Requires the Triggering Offense For a Life Sentence To Be a Serious Felony.

Two objective factors readily present themselves to guide proportionality review in this case. The first, described by Justice Kennedy as the "most prominent objective factor," *Harmelin,* 501 U.S. at 1000, is the type of

punishment imposed. A penalty of life imprisonment without parole differs from other forms of punishment in its total abandonment of any pretense of a rehabilitative purpose. The offender is being permanently removed from society. Unlike the prisoner given a term of years, who can mark the passage of those years on the wall of his cell, the "lifer" must abandon all hope of eventual release. Short of the death penalty, it is the most drastic form of punishment available, once reserved for those who murder with premeditation.

The second objective factor is the nature of the triggering offense. This Court should declare that a life sentence cannot be imposed upon a repeat offender whose offense is less than a serious felony. "Serious" felony can be defined as one punishable by *more* than one year in jail, excluding the California "wobbler" utilized in this case. California casts the net too wide, to encompass not only petit theft with a prior, as in this case, but even offenses involving no criminal intent to steal, such as temporary use of a bicycle without permission of the owner. Calif. Penal Code §§ 499, 499b. Permitting these relatively minor offenses to trigger a life sentence allows an escalation of the penalty far in excess of any legitimate penological purpose. In this case, absent the "Three Strikes" law, the maximum penalty the defendant faced was up to one year in the county jail, or a prison sentence of 16 months, 2 years or 3 years.

Another alternative to define "serious" felony would be to require the triggering offense to be just as serious as the offenses counted as priors. If, as under the California law, only serious or violent felonies can be counted as strikes, then only a serious or violent felony should function as the third strike. To escalate the penalty when the seriousness of the offender's criminality is deescalating serves no legitimate

purpose. Even in baseball, a foul ball is not counted as the third strike.

Conclusion

All four of the principles identified by Justice Kennedy as informing this Court's exercise of proportionality review support the appropriateness of such review in this case. Little or no deference should be given to an initiative process that impedes ameliorative measures. California's explicit endorsement of proportionality as serving the purpose of punishment invites proportionality review. The diversity of our federal system will not be impaired by the limited proportionality review proposed here, and objective factors are readily available to guide that review. For all of these reasons, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE UNITED STATES

BILL LOCKYER Attorney General of the State of California;
ERNEST B. ROE, Warden,

Petitioners,

v.

LEANDRO ANDRADE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Respondent is entitled to federal habeas corpus relief on the ground that his sentence of fifty-years-to-life in prison, imposed under California's "three strikes" statute for two current petty theft offenses, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] Among NACDL's objectives are to promote the proper administration of justice and to ensure that the punishment for criminal conduct fits the crime. To that end, NACDL has appeared as *amicus curiae* in this Court on numerous occasions, including several Eighth Amendment cases. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957 (1991). Because California's application of its three-strikes law to petty offenses imposes punishment that is grossly disproportionate to those offenses, NACDL respectfully submits this brief *amicus curiae* in support of Respondent.

SUMMARY OF ARGUMENT

Andrade's petty theft offenses were not serious enough to warrant the imposition of two consecutive twenty-five-years-to-life prison sentences.

I. Proportionality review under the Eighth Amendment focuses on the crime that triggers the instant sentence. This initial inquiry requires this Court

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amicus* states that no counsel for a party authored any part of this brief and no person or entity, other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

to separate the defendant's underlying current crime from sentence enhancements related to his criminal history. Andrade's underlying current crime, petty theft, is ordinarily a misdemeanor under California law. This classification of Andrade's conduct triggers heightened concern regarding proportional punishment. Courts historically have treated misdemeanor offenses as relatively insignificant transgressions and usually required offenders only to pay a fine. One of the purposes for adopting the Eighth Amendment, in fact, was to require that judges adhere to this historical practice and to refrain from imposing lengthy prison terms upon misdemeanor offenders. This practice of punishing petty offenses more leniently than violent or otherwise serious crimes endures today.

II. Ratcheting up an offender's sentence from a maximum of one year in jail to a minimum of fifty years in prison based on his criminal history places undue weight on the offender's prior convictions. A State may not punish an individual again for his past offenses. Nor may a State punish an individual solely on the assumption that his past offenses demonstrate a propensity to commit serious crimes in the future. Rather, a State may punish recidivists more severely than first-time offenders only to the extent that their criminal record "aggravates their guilt" for committing the new offense. *Graham v. West Virginia*, 224 U.S. 616, 623 (1912).

An individual's criminal record cannot render him *fifty times* more blameworthy than a first-time offender for committing a petty offense. This ratio of criminal history enhancement to "base punishment" for

the current offense far exceeds any that this Court has ever condoned, and it is much higher than that which would be tolerated under this Court's analogous punitive-damages "disproportionality" jurisprudence. This 50-1 ratio also stands far above enhancements that California imposes on other recidivists, where the State typically doubles or triples the sentence for the underlying offense. Finally, this exorbitant enhancement imposed upon petty conduct contravenes the longstanding consensus, grounded in history and in this Court's modern Eighth Amendment precedent, that no-one who commits a non-felonious offense – no matter what his criminal history – is so culpable that he deserves a life sentence or an otherwise lengthy prison term.

ARGUMENT

The Court has established a three-step analysis for determining whether a sentence violates the Eighth Amendment.[2] The first step compares the gravity of the offense to the harshness of the penalty. *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (opinion of Kennedy, J.); *Solem v. Helm*, 463 U.S. 277, 290-91 (1983). Because this issue – particularly the effect of Andrade's

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[2] NACDL urges this Court to follow here its general practice of considering the merits of a case's constitutional issue before addressing whether that law was clearly established at some relevant time. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 201 (2001) (courts should consider constitutional issue before considering whether right was "clearly established" for qualified immunity purposes). "This is the process of the law's elaboration from case to case," *id.*, and it is necessary to guide courts in their proper administration of future criminal trials.

recidivism on the gravity of his offense – is at the heart of this case, NACDL will focus its efforts toward analyzing whether a recidivist's commission of petty theft is sufficiently grave to warrant the imposition of two consecutive twenty-five-years-to-life prison sentences.

Our analysis proceeds in two steps. It mirrors the method by which this Court determined the severity of the repeat offender's crime in *Solem*, 463 U.S. at 296-97, and the means by which courts across the country every day assess the appropriate length of defendants' sentences under the federal sentencing guidelines. First, NACDL discusses the severity of Andrade's conduct – that is, the severity of the crime of petty theft. Second, it considers the effect of the defendant's criminal history on the range of permissible criminal sanctions. The extraordinary criminal-history enhancements that California is imposing here require NACDL – and will require this Court – to analyze the permissible bases of increasing recidivists' sentences in more depth than this Court has done before. NACDL's analysis leads to the inescapable conclusion that the sanction imposed here raises a strong inference of grossly disproportionality. That inference is confirmed elsewhere by the intrajurisdictional analysis contained in the Ninth Circuit's opinion and by the State's acknowledgement that its three-strikes law is "the most stringent in the nation." Petitioner's Br. at 22.

I. Andrade's Underlying Crime – the Crime Upon Which This Court Should Focus – is Relatively Minor.

This Court has emphasized that when reviewing a sentence imposed pursuant to a recidivist sentencing scheme, it "must focus on the principal [crime] – the [crime] that triggers the life sentence – since [the defendant] already has paid the penalty for each of his prior offenses." *Solem*, 463 U.S. at 297 n.21; *see also Coker v. Georgia*, 433 U.S. 584, 599 (1977) ("Coker had prior convictions for capital felonies – rape, murder, and kidnapping – but these prior convictions do not change the fact that the instant crime being punished is rape not involving the taking of a human life."). This initial inspection considers the "absolute magnitude of the crime," apart from any special characteristics regarding the offender, to determine how seriously society views the bare commission of the conduct at issue. *Solem*, 463 U.S. at 293. This inquiry, therefore, requires this Court to separate Andrade's offense characteristics from any enhancements due to his status as a repeat offender and, as a primary matter, to weigh the gravity only of the former.

A. Petty Theft is a Misdemeanor Offense Under California Law.

Petty theft is ordinarily a misdemeanor under California law, punishable by a maximum of six months in county jail. Cal. Penal Code §§ 488 & 490. When a defendant convicted of petty theft has committed certain theft-related offenses in the past, the State may treat the instant offense as a "wobbler" and

punish him as it punishes low-level felons. Cal. Penal Code § 666. But contrary to the arguments of the State and its *amici*, *e.g.*, Petitioner Br. at 13, this heightened potential punishment does not change the character of the defendant's offense. A statutory provision "which simply authorizes a court to increase the sentence for a recidivist . . . does not define a separate crime." *Almendarrez-Torres v. United States*, 523 U.S. 224, 226 (1999). And the California Supreme Court made it clear in 1991 that the offense commonly known as "petty theft with a prior" actually constitutes (i) the base offense of petty theft; and (ii) a sentence enhancement based on the offender's theft-based recidivism, which is codified at § 666. *People v. Bouzas*, 53 Cal.3d 467, 480 (1991). In other words, "[s]ection 666 is a sentence-enhancing statute, not a substantive 'offense' statute," and the prior conviction component of that statute is not an "element" of any offense. *Id.* at 479-80.

This is not necessarily to say that any aspect of federal law prohibits California from "double counting" an offender's recidivism in calculating his sentence under the state penal code. But it does mean that regardless of how many times the State considers a defendant's criminal history in figuring his sentence, the underlying conduct, and the underlying crime, remains the same. As this Court recently put the point, "recidivism does not relate to the commission of the offense," even when state laws are at issue. *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000); *accord Almendarrez-Torres*, 523 U.S. at 230 (statutory provision that authorizes court to increase sentence on the basis of recidivism does not define a separate crime). Here, the underlying offenses remain misdemeanors that are

otherwise punishable by a maximum of six months each in jail. *See* Cal. Penal Code §§ 488 & 490; *see also Durden v. California*, 531 U.S. 1184, 1185 (2001) (Souter, J., dissenting from denial of certiorari) (persons sentenced under three-strikes law for petty theft commit "what would otherwise be misdemeanor theft under the California scheme").

B. The Petty Quality of Andrade's Underlying Offense Triggers More Stringent Review Under the Eighth Amendment.

California's labeling of petty theft as a misdemeanor-level transgression denotes that the offense is among the least serious types of criminal conduct, and it gives rise to a heightened concern regarding proportional punishment. Throughout history, the defining characteristic of misdemeanors has been that they are less serious transgressions than felonies and, therefore, deserving of minimal punishment. In distinguishing misdemeanors from ordinary crimes, Blackstone explained that the term "'crimes[]' is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler names of 'misdemeanors' only." 4 William Blackstone, Commentaries on the Laws of England 5 (1769). Under English common law, in fact, misdemeanors "developed out of the concept of trespass, meaning transgressions against the royal peace; that is, against the state" and were "regarded primarily as a means of raising money for the crown." John Lindquist, Misdemeanor Crime: Trivial Criminal

Pursuit, *in* 4 Studies in Crime, Law and Justice 15 (1988) (internal citations omitted). "Convicted offenders could not be put to death or lose their property for committing [misdemeanors]. They were fined." *Id.* Indeed, it was "rare" to impose any sentence at all for misdemeanor conduct, and requiring an extended prison sentence certainly "would have seemed an absurd expense." *Apprendi v. New Jersey,* 530 U.S. 466, 480 n.7 (2000) (quoting Baker, Criminal Courts and Procedure at Common Law 1550-1800, in Crime in England 1550-1800, p.43 (J. Cockburn ed. 1977)).

One of the objectives of the Cruel and Unusual Punishments Clause of the Eighth Amendment is to require courts to adhere to this historical view. Judges at common law had great discretion in crafting punishments for misdemeanors, as opposed to felonies for which penalties were fixed by law. But, as a leading commentator has explained, these "undefined punishments" for misdemeanors

> were in practice administered lightly. The imposition of heavy discretionary punishments, such as the loss of ears or the payment of immense fines, was the primary cause of the downfall of Star Chamber; in the year of its abolition Heath J. promised that King's Bench would not make the same error. . . *The provision in the Bill of Rights (1689) against the infliction of excessive fines and cruel and unusual punishments, was clearly directed against these discretionary punishments for misdemeanour;* it did not affect judgments fixed by law, however cruel they were.

Baker, *supra* at 44 (emphasis added). The Framers intended the Eighth Amendment to incorporate the protections of the English Bill of Rights, *Harmelin,* 501 U.S. at 966 (opinion of Scalia, J.); *Solem,* 463 U.S. at 285 n.10, and to the extent that the scope of our Constitution's prohibition against cruel and usual punishments has diverged from its English antecedent, it has expanded to apply to certain low-level felonies. *See Harmelin,* 501 U.S. at 997-98 (opinion of Kennedy, J.); *Solem,* 463 U.S. at 286-87. Regardless of one's opinion as to the wisdom of that expansion, however, it is plain that the original intent of the Eighth Amendment required courts to review *misdemeanor* punishments for disproportionality and to afford less deference to any legislative decisions regarding appropriate punitive sanctions for the proscribed conduct than would otherwise be the case. This Court recognized as much in *Rummel v. Estelle,* 445 U.S. 263 (1980), when it acknowledged that even if the length of sentences imposed "for crimes concededly *classified and classifiable as felonies,* that is, as punishable by significant terms of imprisonment in a state penitentiary, . . . is purely a matter of legislative prerogative," a constitutionally mandated proportionality principle may "come into play" concerning more minor infractions. *Id.* at 474 & n.11 (emphasis added).

This desire to constrain the range of punishments for misdemeanors has become firmly embedded in the "standards of decency" that prevail today. *Atkins v. Virginia,* 122 S. Ct. 2242, 2247 (2002). "The difference in

treatment between felonies and misdemeanors has carried over from common law to current practice, and today misdemeanors are often treated differently than felonies [in] the procedures employed in trying such cases as well as [in] the consequences of a conviction." Rollin M. Perkins & Ronald N. Boyce, Criminal Law 15 (3d ed. 1982). Black's Law Dictionary's modern definition of misdemeanor - which is presumably definitive, *Buckhannon Bd. & Care Home Inc. v. West Va. Dept. of Health and Human Resources,* 532 U.S. 598, 603 (2001) - provides that a misdemeanor is "[a] crime that is less serious than a felony and is usu[ally] punishable by fine, penalty, forfeiture, or confinement (usu[ally] for a brief term) in a place other than prison (such as a county jail)." Black's Law Dictionary 1014 (7th ed. 1999); *see also United States v. Indelicato,* 97 F.3d 627, 631 (1st Cir. 1996) (reaffirming "the traditional distinction between felony and misdemeanor" conduct as "the potential for a sentence of more than one year").

Andrade's current offenses involved misdemeanor-level conduct. They were non-violent property crimes that did not involve any threat to any person, and the property involved is of minimal value (less than $100 for each offense). The relative insignificance of those offenses, coupled with the fact that his sentence is among the harshest that can be imposed under the law, raises an initial inference of gross disproportionality. The central issue in this case is whether Andrade's criminal history affects that determination.

II. Ratcheting up a Petty Offender's Sentence from a Maximum of One Year in County Jail to at Least Fifty Years in Prison Based on His Prior Convictions Places Undue Weight on His Criminal History.

The State does not really even argue that a twenty-five-years-to-life sentence for petty theft of about $75 worth of merchandise, standing alone, could survive proportionality review under the Eighth Amendment - let alone that two such consecutive sentences could withstand such scrutiny. Thus, the State apparently agrees that Andrade's sentence may be upheld only if his criminal history allows California dramatically to enhance his sentence. Put simply, the issue here is whether a State may punish a recidivist *fifty times* more harshly for engaging in illegal conduct than it would a first-time offender.

There are three ways that a State might rely on an offender's criminal history in order to increase his sentence for a current conviction. First, a State might infer from the commission of the instant offense that the offender was not sufficiently punished for his prior crimes the first time around and decide to punish him for those crimes more severely now. Second, a State might conclude that the instant infraction, coupled with his past offenses, shows that the defendant is bound to commit more crimes in the future and decide to increase his term of imprisonment solely to prevent any such future crimes. Third, a State might presume that the defendant's prior offenses render him more culpable for committing the instant infraction. To any

extent that California's three strikes law rests on either of the first two theories, it violates well-established constitutional guarantees. An analysis of this Court's precedent shows that the third theory - increased culpability - cannot support the fifty-fold enhancement that California imposes on petty thieves who have prior convictions.

A. The Double Jeopardy Clause Prohibits States From Punishing Defendants Again for Prior Offenses.

California's former Secretary of State, who was an author of the State's three-strikes law and whom the State seems to view as an authoritative voice on it, has remarked that "[w]hen three strikers are finally put away, the punishment is consideration for a career in crime, *not just the final offense.*" Bill Jones, *Why the Three Strikes Law is Working in California,* 11 Stan. L. Rev. 23, 23 (1999) (emphasis added). The California Court of Appeal likewise has explained that "[u]nder the three strikes law, defendants are punished *not just for their current offense* but for their recidivism." *People v. Cooper,* 43 Cal. App. 4th 815, 823 (1996) (emphasis added); *see also People v. King,* No. FBA05576, 2002 WL 192739, at *10 (Cal. App. Feb. 7, 2002) (same).

This desire to punish defendants for actions beyond their current offense is at best imprecise rhetoric, and at worst unconstitutional. Although this Court repeatedly has observed that States may punish recidivists more severely than first-time offenders, it is equally well established that the Double Jeopardy Clause prohibits States from punishing defendants

again for prior offenses. *North Carolina v. Pearce,* 395 U.S. 711, 717-18 (1969); *Ex Parte Lange,* 85 U.S. (18 Wall.) 163, 173 (1874). This Court, therefore, has explained that a three-strikes type sentence is valid only if "the defendant is still being punished *only for the offense of conviction.*" *Witte v. United States,* 515 U.S. 389, 402 (1995) (emphasis added). The recidivism enhancement cannot be treated "as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger v. Burke,* 334 U.S. 728, 732 (1947); *see also Witte,* 515 U.S. at 400, 403 (criminal history enhancement valid because "the offender is still being punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment") (emphasis added); *Graham v. West Virginia,* 224 U.S. 616, 623 (1912) (Repeat offenders "are not punished the second time for the earlier offense"); *Moore v. Missouri,* 159 U.S. 673, 677 (1895) (same). If a California court permits its law to reach beyond those confines, it violates the Double Jeopardy Clause.

One aspect of California's three-strikes law, in fact, gives rise to a particular concern that it is placing undue weight on offenders' past crimes. The three-strikes law requires a defendant's first two "strikes" to be "serious" or "violent" felonies, but his third strike may be any felony at all, or even an enhanced misdemeanor such as petty theft. *See* Cal Penal Code §§ 667(e)(2)(A) & 1192.7. Therefore, a person who has committed two "serious" felonies in the past and whose third crime is a non-serious and non-violent felony (or an elevated misdemeanor) receives a twenty-

five-year minimum sentence. Yet a person who commits the same three crimes but in a different order is not subject to the three-strikes law. Even though the latter person's current crime is *more serious*, he is subject to a *shorter* sentence. This outcome-determinative influence of the character of repeat offenders' past crimes, instead of their current crime, suggests that the State is treating past crimes as more than simply a factor that aggravates the severity of a new crime.

B. The Due Process Clause and the Eighth Amendment Prohibit States from Punishing Defendants Solely for a Propensity to Commit Future Offenses.

It appears that another of California's goals in sentencing petty offenders like Andrade to such lengthy sentences based on their prior offenses is to foreclose the possibility they might commit future crimes. *See* Petitioner's Br. at 23. The California Court of Appeal has observed that "[t]he three strikes law is the Legislature's attempt to address the threat to society posed by the class of persons *previously* convicted of serious or violent felonies." *Cooper*, 43 Cal. App. 4th at 829 (emphasis added); *accord People v. Ingram*, 40 Cal. App. 4th 1397, 1415-16 (1995). The three-strikes law's co-author put the point in more concrete terms: "The simple goal of Three Strikes is public safety. It is far better, for example, to remove a child molester from the streets for the commission of a so-called lower level felony than to wait for the offender to abuse another victim." Jones, 11 Stan L. Rev. at 25. This theory, applied to this case, seems to be that if a petty thief has committed more serious

offenses in the past, the State may put him in prison "not so much [due to] the new crime he committed," but rather because he presumably will commit a more serious crime in the future. *People v. Edwards*, 97 Cal. App. 4th 161, 165-66 (2002).

Once again, the Constitution precludes this Court from upholding the three-strikes law on this basis. It is a fundamental precept of due process that the government may not punish individuals simply for their propensity to commit future crimes. As Justice Holmes explained long ago: "Intent to commit a crime is not itself criminal. There is no law against a man's intending to commit a murder the day after to-morrow. The law only deals with conduct." Oliver Wendell Holmes, The Common Law 65 (1923 ed.). Justice Black later described "punishment for a mere propensity, a desire to commit an offense" as "a situation universally sought to be avoided in our criminal law." *Powell v. Texas*, 392 U.S. 514, 543 (1968) (Black, J., concurring). This Court applied this principle in *Robinson v. California*, 370 U.S. 660 (1962), holding that the Eighth Amendment prohibits a State from punishing an individual for the "status" of being addicted to narcotics. Justice Harlan explained that "[s]ince addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of [the state law] was to authorize criminal punishment for a bare desire to commit a criminal act." *Id.* at 678-79 (Harlan, J., concurring).

To be sure, once a defendant commits a criminal act, his future dangerousness may figure into the length of his sentence. *See, e.g., Simmons v. South Carolina*, 512

U.S. 154 (1994). But the resulting sentence still may punish him only to the extent otherwise justified by the actual criminal act and by customary principles of just desserts. *See Witte*, 515 U.S. at 399 ("evidence of related criminal conduct [may] enhance a defendant's sentence for a separate crime *within statutory limits*" for the separate crime) (emphasis added); *cf. Estelle v. McGuire*, 502 U.S. 62, 74-75 (1991) (defendant's propensity to commit crime may not factor into a jury's determination of guilt for current crime). A desire to incapacitate, in other words, may figure into a State's penological policies, but it may not *alone* justify a person's imprisonment when there is no other legitimate basis for punishing him.

In recent years, States have tested the outer boundaries of this principle by enacting so-called sexual predator statutes, which incapacitate persons deemed to have mental defects that render them likely to engage in future violent acts. *See Kansas v. Crane*, 122 S. Ct. 867, 870 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Allen v. Illinois*, 478 U.S. 364 (1986). These state laws, like California's three-strikes enhancement, rely in part on "prior criminal conduct" as an indicator of offenders' propensity to future commit crimes. *See Hendricks*, 521 U.S. at 362; *Allen*, 478 U.S. at 371. In upholding these sexual predator laws, moreover, this Court has held that the Constitution permits States to incapacitate sex offenders beyond their prison terms for their underlying crimes.

But sexual predator laws, in contrast to California's three-strikes law, impose *civil commitment* that must terminate upon successful treatment, not an

additional *punishment* of a prison term that need not even include rehabilitation. This is a critical distinction. In upholding the sexual predator laws, this Court has deemed it pivotal that they do not exact punishment for the offender's past acts. *See Crane*, 122 S. Ct. at 870; *Seling v. Young*, 531 U.S. 250, 262 (2001) (purpose is "not to punish"); *Allen*, 478 U.S. at 371 (evidence of prior criminal conduct was not used "to punish past misdeeds"). An individual sentenced pursuant to California's three-strikes law, however, is indisputably punished, and if his triggering offense is petty theft, he is confined "not so much [for] the new crime he committed," but rather because the State assumes that he will commit a more serious crime in the future. *Edwards*, 97 Cal. App. 4th at 165-66; *see also* Petitioner Br. at 23; Jones, 11 Stan L. Rev. at 25. This predominant focus on incapacitation treads on bedrock due process principles and, thus, cannot provide a valid basis for sustaining the three-strikes law.

C. An Individual's Criminal History Cannot Make Him Fifty Times More Culpable Than a First-Time Offender for Committing a Nonviolent Criminal Act.

Because California may not punish defendants under its three-strikes law for their past or predicted future crimes, the enhancement mandated by Cal. Penal Code § 666 and the three-strikes law may be based only on the defendant's heightened culpability for the instant crime. This Court's justifications for recidivism enhancements, in fact, have consistently rested on this basis. Over a century ago, this Court explained that a repeat offender, "by his persistence in

the perpetuation of crime, . . . has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense." *Moore,* 159 U.S. at 677; *Graham.,* 224 U.S. at 623 ("[R]epetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted."). In recent years, this Court likewise has held that a repeat offender "is still being punished only for the fact that the present offense was carried out in a manner that warrants increased punishment." *Witte,* 515 U.S. at 403.

The issue here thus becomes whether Andrade's "repetition of criminal conduct," *Graham,* 224 U.S. at 623, when he shoplifted the videotapes renders him *fifty times* more culpable than a first-time shoplifter. Three guideposts suggest that is does not: (1) the ratio between the minimum sentence Andrade must serve and the maximum punishment for petty theft is exorbitant; (2) this same ratio is wholly out of line with the multiplier that California itself ordinarily imposes on repeat offenders; and (3) no petty offender, no matter what his criminal history, can be so culpable as to warrant a prison term that is measured in decades.

1. The ratio of the minimum sentence Adrade must serve to the maximum penalty for his underlying crimes is exorbitant and far exceeds any that this Court has ever approved.

This Court recently reaffirmed that "[p]roportionality review under" the Eighth Amendment

"should be informed by '"objective standards to the maximum possible extent."'" *Atkins v. Virginia,* 122 S. Ct. 2242, 2247 (2002) (quoting *Harmelin,* 501 U.S. at 1000 (quoting in turn *Rummel,* 445 U.S. at 263)); *accord Solem,* 463 U.S. at 292. In order to serve the same goal in the context of reviewing the proportionality of punitive damages awards, this Court has adopted the objective criteria of ratios. *See BMW v. Gore,* 517 U.S. 559, 580-81 (1996). Comparing the harm caused or threatened to the victim to the amount of exemplary damages helps show whether there is a "reasonable relationship" between the defendant's underlying act and the punitive enhancement. *Id.* at 581 (quoting *TXO Prod. Corp. v. Alliance Resources Corp.,* 509 U.S. 443, 460 (1993)).

It is appropriate to undertake a comparable inspection here. Punitive damages are "quasi-criminal," *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 19 (1991), and this Court has held that the "same general criteria" that determine whether a criminal sentence is "grossly disproportionate" also determine whether a punitive award is excessive. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 434-45 (2001) (citing *Solem,* 463 U.S. at 290-91, 293, 303); *see also Solem,* 463 U.S. at 292 ("Comparisons can be made in light of the harm caused or threatened to the victim or society."). This Court also has indicated that a criminal enhancement based on prior criminal conduct should bear a reasonable relationship to the punishment for the underlying current offense. *See Witte,* 515 U.S. at 403 (recidivism enhancement did not "become 'a tail which wags the dog of the substantive offense'") (quoting *McMillian v. Pennsylvania,* 477 U.S. 79, 88 (1986)). Indeed, recidivism sentence enhancements are

particularly akin to punitive damage awards because such enhancements, just like punitive awards, "are specifically designed to exact punishment in excess of actual harm to make it clear that the defendant's misconduct was especially reprehensible." *Haslip*, 499 U.S. at 54 (O'Connor, J., concurring); *compare Moore*, 159 U.S. at 677 (recidivism evinces "depravity, which merits a greater punishment").

The ratio of the minimum term that Andrade must serve to the maximum punishment for his underlying offenses is 50-to-1.[3] Each of Andrade's petty thefts alone carries a maximum penalty of six months in jail. When his sentence was enhanced due to his criminal history, it became two consecutive 25-year prison sentences. (Ewing's ratio between his minimum term and the maximum for his underlying offense, even assuming that it would have been charged as a felony, is at least 12.5-to-1, and is perhaps as high as 18.75-to-1, depending on exactly how California law would have required him to be sentenced if he had been a first-time offender.[4])

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[3] Framing the ratio comparison this way gives the maximum possible benefit to the State. If one were to compare the actual maximum term that an offender would serve (instead of the statutory maximum) for petty theft to the minimum term under the three-strikes law, the ratio would rise to 75-to-1. California law mandates that individuals receive "good time" credit for one-third of their six-month sentences. *See* Cal. Penal Code §4019.

[4] Ewing's current crime is grand theft. That crime is a "wobbler" under California law, which is punishable either as a misdemeanor with a one-year maximum jail sentence, or as a felony. If treated as a felony, the offense is generally punishable by two years in prison unless a judge finds a mitigating circumstance, in which case the punishment is 16 months. Cal. Penal Code §489(b); Cal.

The ratio here is much higher than the ratio in any recidivist sentence that this Court has ever condoned. Most recidivism enhancements that this Court has upheld do no more than double the maximum sentence for the underlying crime, and none even approaches the severity of the enhancement here. These ratios are set forth in the margin.[5] The ratio in *Rummel*, for instance, between the defendant's

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Rules of Court 4.420(a). Ewing's crime had one mitigating circumstance: he was suffering from physical conditions (AIDS and a drug addiction) that significantly reduced his culpability, so it appears likely that, as a first-time offender, he would have received a 16 month sentence. *See* Cal. Rules of Court 4.423(b)(2). While it is also true that sentences for grand theft may be enhanced to three years if certain aggravators are present, *see* Cal. Rules of Court 4.421, the only potentially aggravating factors attendant to Ewing's crime relate to his recidivism and, thus, do not measure the potential sentence of a first-time offender. *Solem*, 463 U.S. at 293. (Furthermore, the aggravating factors unrelated to recidivism appear to be subject to the *Apprendi* requirements, and none were charged or proven here.)

[5] *See Monge v. California*, 524 U.S. 721 (1998) (2.2-1; current crime punishable by 5 years); *Witte v. United States*, 515 U.S. 398 (1995) (less than 1:1; sentence enhanced within guideline range for current offense); *Parke v. Raley*, 506 U.S. 20 (1992) (2:1; current crime punishable by 5 years); *Gryger v. Burke*, 334 U.S. 728 (1948) (10 year maximum sentence increased to life imprisonment); *McDonald v. Massachusetts*, 180 U.S. 311 (1901) (sentence for four current felonies was increased to life imprison based on two past offenses; maximum for current felonies not stated, nor is parole eligibility discussed); *Moore v. Missouri*, 159 U.S. 673 (1:1; current crime was punishable by life). The Model Sentencing and Corrections Act also provides that no sentence enhancement on the basis of recidivism may more than double the maximum sentence for the underlying crime. *See* 10 Uniform Laws Annotated, Model Sentencing and Corrections Act § 3-104 (2001).

minimum term of years and the maximum sentence for his current underlying crime was 1.2-to-1. The defendant was eligible for parole after twelve years, and the maximum sentence for his underlying current crime would have been ten years in prison. *Rummel*, 445 U.S. at 266, 276, 280. The largest prior ratio between a defendant's life sentence and the maximum sentence for his current underlying crime was life-to-five-years. *Graham*, 224 U.S. at 621. The *Graham* Court did not say whether or when the defendant was eligible for parole. In *Solem*, however, the defendant also had a life-to-five-years ratio without the possibility of parole, and this Court found the sentence excessive. If one assumes that life-to-five years is a borderline case that depends on parole eligibility and other factors, it seems apparent that Andrade's life-to-six-months enhancement is so much more severe that it cannot stand

The enhancement ratio that California imposes on third-strike petty offenders like Andrade far exceeds even those that the Due Process Clause would tolerate in the punitive damages context, where money, not personal liberty, is at stake. This Court's punitive damages jurisprudence has reaffirmed that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence," and it has held that more passive actions may not be punished as severely as those that threaten personal harm. *BMW*, 517 U.S. at 575-76 (citing *Solem*, 463 U.S. at 292-93). The federal courts of appeals thus have "surmise[d]" from this Court's proportionality jurisprudence that when a civil defendant causes only "economic injur[ies]" that are "not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio."

Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634, 639 (10th Cir. 1996); *accord Neibel v. Trans World Assur. Co.*, 108 F.3d 1123, 1132 (9th Cir. 1997); *see also BMW*, 517 U.S. at 581 (ratio in prior economic harm case "was not more than 10-1").

Andrade's petty theft offense, like most such offenses, was not accompanied by any violence or threat of violence; it caused only easily quantifiable economic harm. Ergo, such a defendant's punishment for committing petty theft should not be enhanced by more than ten times the base sentence that a State has set to reflect the maximum harm that such an offense can cause. Indeed, because criminal sentences, unlike punitive awards, entail deprivations of personal liberty, the maximum enhancement ratio for criminal offenses that cause only economic harm should be considerably lower than 10-to-1. To hold otherwise would be to afford greater constitutional protection to corporations' pocketbooks than to individuals' personal freedom – a demonstrably absurd result.

2. California itself recognizes elsewhere in its three-strikes law that even violent repeat offenders are generally only two or three times as culpable as first-time offenders.

Two other provisions of California's three-strikes law confirm that the enhancement it imposes on repeat petty offenders grossly overstates their culpability. First, the three-strikes law provides that when a person who has been convicted of a prior

serious or violent felony commits a second such offense, his sentence for the current offense is simply doubled. Cal. Penal Code § 667(e)(1). Assuming that this enhancement reflects a reasonable approximation of the increased depravity involved in the second offense, it is impossible to understand how a person could suddenly become fifty times more blameworthy for committing a third offense.

A second provision of California's three-strikes law, in fact, reveals that not even the State really believes that an offender's culpability can increase so dramatically based on such an incremental addition to a person's criminal history. The State acknowledges that it is "appropriate" to compare Andrade's sentence to the "sentences received by more serious recidivists in California." Petitioner Br. at 22. But this comparison is jarring. The three-strikes law, when applicable, provides that the sentence for a third-time offender must be the greater of: (i) triple the maximum punishment for the current offense; or (ii) twenty-five years. Cal. Penal Code §§ 667(e)(2)(A)(i) & (ii). In other words, California itself has determined that an ex-felon who commits a third serious felony - rape or robbery, for example - is only *three times* as culpable as a first-time offender who does the same thing. Yet the law's twenty-five-year minimum sentence treats repeat offenders who commit petty offenses as if their recidivism is far more blameworthy than that of repeat offenders who persist in committing violent felonies. This scheme is perverse. If anything, a petty offense is less aggravated when committed by a repeat offender than is a serious or violent offense.

3. No petty offender - no matter what his criminal history - is so culpable that his offense warrants an extended prison term.

With the exception of California's three-strikes law, a broad consensus has developed over a long period of time that recidivist statutes that mandate life or otherwise lengthy prison terms should be applied only to repeat offenders whose current crimes, standing alone, unambiguously constitute felonies. This consensus reflects the considered judgment that an offender's culpability depends primarily on the character of his actions or threatened actions, not on intangible aspects of his status. It also finds support in this Court's jurisprudence, which has consistently distinguished between the gravity of committing felonies and non-felonies.

During the late 1800's and early 1900's, many States enacted habitual offender laws that mandated severe punishment for repeat offenders. Lawrence Friedman, Crime and Punishment in American History 161 (1993). Those laws, however, almost universally required the triggering offense to be a felony.[6] Two

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[6] Amicus was able to uncover relevant decisions from twenty-four States in the first four decades of the 1900's, and twenty-three of the habitual offender statutes that mandated life or otherwise lengthy sentences required that the triggering offense be a felony. *See People v. Wagner*, 248 P. 946, 947 (Cal. App. 1926); *Smalley v. People*, 43 P.2d 385 (Colo. 1935); *Cross v. Florida*, 119 So. 380, 381 (Fla. 1928); *State v. Lovejoy*, 95 P.2d 132, 133 (Idaho 1939); *People v. Cohen*, 8 N.E.2d 184, 184 (Ill. 1937); *Goodman v. Kunkle*, 72 F.2d 334 (7th Cir. 1934) (Indiana law); *Haley v. Hollowell*, 227 N.W. 165, 166 (Iowa 1929); *Kansas v. Close*, 287 P. 599, 600 (Kan. 1930); *Anderson v.*

decisions from that period, moreover, construed state law to forbid exactly what California is doing here – namely, elevating a misdemeanor to a felony on the basis of prior crimes, and then using that elevated offense to trigger a life sentence. *State v. Brown*, 112 S.E. 408 (W. Va. 1922); *Stover v. Commonwealth*, 22 S.E. 874, 875 (Va. 1895). These courts held that, in order to trigger such a severe sentence, each of the offender's crimes "must be a felony . . . because of the character of the offense, and not because of the character of the offender." *Stover*, 22 S.E. at 875.

In modern times, most States have continued to hew to the rule that crimes that trigger life or otherwise lengthy prison terms must be felonies because of the character of the offense, and a "clear majority" of States now expressly prohibits the "stacking" of recidivist enhancements to increase a misdemeanor to a felony and then to trigger a habitual offender law. *See Lawson v. State*, 746 S.W.2d 544, 545 (Ark. 1988) (summarizing interjurisdictional survey). Even in the rare instances when state law allows such stacking, state supreme courts have refused to allow non-felonious conduct to be punished by life or otherwise lengthy prison terms – regardless of the defendant's criminal history. The West Virginia Supreme Court, for example, has ruled that a third offense that is elevated to a felony because of a defendant's criminal history, and thereby triggers a second habitual offender enhancement, can support a one-to-eight year sentence, but cannot support a life sentence. *Compare State v. Williams*, 474 S.E.2d 569 (W. Va. 1996) (misdemeanor could lead to a one-to-eight year sentence) *with State v. Deal*, 358 S.E.2d 226, 231 (W. Va. 1987) (life sentence imposed for non-violent third offense violated state constitution's proportionality requirement).

Even the California Supreme Court, before the enactment of the current three-strikes law, held that elevating a misdemeanor indecent exposure offense "to a life-maximum felony" based on the defendant's criminal record violated the proportionality component of the California Constitution. *In re Lynch*, 503 P.2d 921, 937 (Cal. 1973). Surveying the law in other States and the position of the American Bar Association, the California Supreme Court concluded that "whatever the response appropriate to the factor of recidivism, the judgment of the Legislature as to the gravity of the act

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Commonwealth, 195 S.W. 794, 795-796 (Ky. 1917); *State v. Dreaux*, 17 So. 2d 559, 561 (La. 1944); *McDonald v. Massachusetts*, 180 U.S. 311, 311 (1901); *People v. Palm*, 223 N.W. 67, 67 (Mich. 1929); *State v. Lee*, 298 S.W. 1044 (Mo. App. 1927); *State v. Paisley*, 92 P. 566, 569 (Mont. 1907); *Taylor v. Nebraska*, 207 N.W. 207, 209 (Neb. 1926); *State v. Alarid*, 62 P.2d 817, 819 (N.M. 1936); *Carlesi v. New York*, 233 U.S. 51, 55-56 (1914); *North Dakota v. Malusky*, 230 N.W. 735, 736-737 (1930); *Blackburn. v. State*, 36 N.E. 18, 20 (Ohio 1893); *Ex parte Bailey*, 64 P.2d 278, 280 (Ok. 1936); *State v. Smith*, 273 P. 323, 323 (Or. 1929); *Commonwealth v. Curry*, 132 A. 370, 371 (Pa. 1926); *McCummings v. State*, 134 S.W.2d 151, 152 (Tenn. 1939); *Garcia v. State*, 145 S.W.2d 180, 180 (Tx. 1940). New York's and Oklahoma's law allowed petit larceny convictions to trigger its habitual offender statute, but in that case the laws expressly limited the resultant sentence to "no[t] more than twice the longest term, prescribed upon a first conviction" and five years, respectively. *Carlesi*, 233 U.S. at 56 (quoting N.Y. Penal Law § 1941); *Bailey*, 64 P.3d at 280. Only Washington's law permitted non-felonies to trigger a life sentence under its "three strikes" statute. *Washington v. Roberts*, 275 P. 60, 61 (Wash. 1929). In 1984, however, Washington amended its law to require that all three offenses, including the triggering offense, be among a list of "most serious" felonies. *See State v. Thorne*, 921 P.2d 514, 533 & n.13 (Wash. 1996).

itself should remain relatively constant," or at least bear a "reasonable relationship" to the penalty actually imposed. *Id.* at 937-38. The Court specifically noted the ABA's view that imposing a life sentence on a recidivist for committing petty larceny would be "intolerable." *Id.* at 938 n.25.

This general consensus that a criminal act ought to be a felony in and of itself in order to trigger a life or otherwise lengthy prison term also comports with this Court's jurisprudence. This Court stated in *Rummel* that States may properly conclude that persons who repeatedly commit "criminal offenses *serious enough to be punished as felonies*" may be sentenced to lengthy sentences under recidivist statutes. 445 U.S. at 276. But the Court emphasized that prosecutors retained discretion "so as to screen out truly 'petty' offenders who fall within the literal terms of the [Texas] statute." *Id.* at 281. Only when a repeat offender's current underlying crime is "concededly classified *and* classifiable as a felony," *id.* at 274 (emphasis added), this Court indicated, is it grave enough to trigger a life sentence or its approximate equivalent. Hence, this Court suggested that regardless of an offender's criminal history, a State could not label "overtime parking" a felony, and then use that infraction to trigger a life sentence. *Rummel,* 445 U.S. at 274 n.11.

This Court confirmed this "classified and classifiable" principle in *Solem.* Although South Dakota law "classified" the defendant's current underlying offense – uttering a "no account" check for $100 – as a felony, this Court strongly indicated that the conduct was not "classifiable" as a felony. The Court noted not

only that the crime lacked any violence or threat of violence and that it involved a small amount of money, but also that that sum of money was "less than half the amount South Dakota required for a felonious theft." 463 U.S. at 296 & n.20. This observation suggested that since South Dakota had not designated a minimum amount of money necessary to constitute felonious "no account" check uttering, there was a serious question whether the State really viewed the offense at issue as unambiguously non-felonious conduct. The offense, therefore, could not trigger a life sentence under a recidivist statute.

Although the State here attempts to distinguish *Solem* on the ground that "petty theft with a prior" is a felony in California, Petitioner Br. at 12-13, this Court's analysis in *Rummel* and *Solem* compels the conclusion that the State may not use such petty theft convictions, or any other passive offense that it does not unambiguously classify as a "felony," to trigger a twenty-five-years-to-life sentence under its three-strikes law. As explained above, "petty theft with a prior" is a "wobbler" that is more properly viewed as misdemeanor conduct with a sentence enhancement, not as a felony. But even if the State did classify minor shoplifting as a felony, the Eighth Amendment would still forbid punishing it so severely because it would not be "classifiable" as a felony. To hold otherwise – that petty offenses may lead to sentences of the length at issue here – would be to allow States unconstitutionally to punish past or predicted future conduct under the guise of enhancing a sentence for the incrementally aggravating factor of recidivism.

CONCLUSION

This Court should hold that Andrade's sentence violates the Eighth Amendment and affirm the Court of Appeals.

Respectfully submitted this 17th day of July, 2002.

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In the Supreme Court of the United States

BILL LOCKYER, ATTORNEY GENERAL OF CALIFORNIA,
PETITIONER,

v.

LEANDRO ANDRADE,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF DONALD RAY HILL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BILL LOCKYER, ATTORNEY GENERAL OF CALIFORNIA,
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BRIEF OF DONALD RAY HILL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

This brief is filed on behalf of Donald Ray Hill ("Hill"). Like Respondent Leandro Andrade, Hill was sentenced pursuant to California's Three Strikes Law in violation of the Eighth Amendment's ban against cruel and unusual punishment. Hill was sentenced to a term of 40 years to life

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1 Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *Amicus* or his counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

in prison for a single count of attempted residential burglary for breaking a $20 pane of glass, after having admitted, on the advice of counsel, the allegations of four prior nonviolent crimes. Hill's sentence is without the possibility of parole until he has served the minimum 40-year term, or until he is 82 years old. *See* Cal. Penal Code § 1170.12(c)(2)(A)(iii); *see also People v. Superior Court (Romero)*, 917 P.2d 628, 631 (Cal. 1996); *People v. Dotson*, 941 P.2d 56, 58-59 (Cal. 1997).

In the decision under review before this Court, the Ninth Circuit held unconstitutional under the Eighth Amendment a lifetime sentence without a meaningful possibility of parole imposed under California's Three Strikes Law in the context of a nonviolent property crime. *See Andrade v. California*, 270 F.3d 743, 767 (9th Cir. 2001), *cert. granted sub nom., Lockyer v. Andrade*, 122 S.Ct. 1434, 152 L.Ed.2d 379 (U.S. Apr. 01, 2002) (No. 01-1127). Subsequently, in *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002), *petition for cert. filed*, 70 U.S.L.W. 3643 (U.S. Mar. 07, 2002) (No. 01-1487), the Ninth Circuit again held unconstitutional on Eighth Amendment grounds sentences of 25 years to life imposed on two recidivist defendants, emphasizing the absence of a realistic possibility of parole and the disproportionate penalty imposed for the *last* offense committed. *See Brown*, 283 F.3d at 1028. In both *Andrade* and *Brown*, the Ninth Circuit overturned the life sentences imposed as grossly disproportionate to the nonviolent property crimes at issue, namely, petty theft. *See Andrade*, 270 F.3d at 767; *Brown*, 283 F.3d at 1028.

Amicus has a vital interest in this Court's decision in this case. Like the defendants in *Andrade* and *Brown*, Hill was sentenced to an indeterminate sentence up to and including life in prison pursuant to California's Three Strikes Law for committing a single count of an attempted nonviolent property crime. Like Andrade, Hill, now 48 years old, will not be eligible for parole until he is over 80

years old. Mr. Hill will likely die in prison. Like the property crimes committed in *Andrade* and *Brown*, the attempted burglary committed by Hill was nonviolent in nature and involved only minimal monetary damage.

More significantly, Hill's offense and his nonviolent criminal record bear a striking resemblance to the underlying circumstances of this Court's controlling opinion in *Solem v. Helm*, 463 U.S. 277 (1983). Both Hill and the defendant in *Solem* were convicted of low-impact felonies, i.e., nonviolent felonies causing minimal material damage, and both had prior convictions for burglary. Like the defendants' punishments in *Andrade*, *Brown* and *Solem*, Hill's sentence of 40 years to life in prison without a realistic possibility of parole, for the commission of a single count of a nonviolent attempted property crime, amounts to cruel and unusual punishment in violation of the Eighth Amendment.

In *Solem*, 463 U.S. at 291-292, and *Harmelin v. Michigan*, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring), this Court adopted a three-part test to determine the constitutionality of the punishment at issue. Pursuant to this test, the Court must first compare the gravity of the offense to the harshness of the penalty imposed. If that threshold comparison leads to an inference of gross disproportionality between the crime and the sentence, the Court must proceed to compare the sentence imposed with (1) sentences imposed for other crimes in the same jurisdiction, and (2) sentences imposed for the same crime in other jurisdictions. *See Solem*, 463 U.S. at 292; *Harmelin*, 501 U.S. at 1003-1004. Further, this Court has made clear that the protections of the Eighth Amendment rest on the proportionality of the crime of conviction to the penalty imposed and on the gravity of *that* crime; they do *not* hinge on the formal statutory classification of the crime as either a felony or misdemeanor, or on the political label attached accordingly by state legislatures. *See Solem*, 463

U.S. at 291-293; *Witte v. United States*, 515 U.S. 389, 400 (1995). No sentence is *per se* constitutional, and no state can insulate from this Court's constitutional review an otherwise unconstitutional sentencing scheme simply by invoking concepts of federalism and deference to legislative determinations. *Solem*, 463 U.S. at 290.

Several Justices of this Court have expressed concern over the fact that California's Three Strikes Law applies to petty theft, a crime ordinarily classified as a misdemeanor. *See Riggs v. California*, 525 U.S. 1114 (1999) (Stevens, J., dissenting) (memorandum respecting denial of certiorari); *accord, Durden v. California*, 531 U.S. 1184 (2001) (Souter, J., dissenting) (memorandum respecting denial of certiorari). *Andrade* is a case directly on point. However, *Amicus* respectfully submits that the Justices' concerns should extend beyond the narrow issue in those cases. In *Solem*, the defendant, like Hill, was convicted of a felony; nevertheless, this Court, emphasizing the minimal damage and overall low impact caused by the offense, held that a lifetime prison term without possibility of parole violated the Eighth Amendment. *See Solem*, 463 U.S. at 296-297, 303. The distinction between a misdemeanor and a felony, like the penalty scheme applicable to repeat offenders, is a legislative classification based on a political agenda rather than on an individualized determination of the gravity of the triggering offense. While deference to legislative decisions is more pronounced when the crime of conviction is classified as a felony rather than as a misdemeanor (*Riggs*, 525 U.S. at 1114), it is always the gravity of the offense that must be determinative, *not* its formal classification. *See Solem*, 463 U.S. at 291-293. The political aim pursued with California's Three Strikes Law has failed in many respects, specifically with regard to property crimes, and it has led to a grossly disproportionate practice in sentencing within the state – both with regard to the crimes covered by the

statute and with regard to the statute's target population. *See infra* Section III. The statute in its present form, therefore, simply cannot be considered a constitutional basis to uphold sentences like those imposed on Andrade or Hill.

While *Andrade* addresses a significant aspect of California's Three Strikes Law, Hill's case demonstrates that a proper evaluation of the constitutional issues implicated here requires full consideration of California's recidivist law and its social, political, and constitutional consequences. Specifically, this Court should consider the constitutionality of imposing a sentence of life in prison for the commission of a single nonviolent property crime, regardless of whether the core criminal conduct is legislatively classified as a felony or a misdemeanor. Indeed, by simultaneously granting certiorari in the matter of *Ewing v. California*, a case involving the theft of three golf clubs worth $399 each (and thus, an offense classified as a felony), this Court has indicated its willingness to consider more broadly the constitutional implications of California's Three Strikes Law as applied not only to misdemeanor, but to felony conduct as well. *See Ewing v. California*, 122 S.Ct. 1435, 152 L.Ed.2d 379 (U.S. Apr. 01, 2002) (No. 01-6978) (memorandum granting certiorari and granting motion to proceed in forma pauperis); *People v. Ewing*, No. S098041, 2001 Cal. LEXIS 4704 (Cal. July 11, 2001); *People v. Ewing*, No. B143745, 2001 WL 1840666 (Cal. App. Apr. 25, 2001). Hill's triggering offense, attempted residential burglary, was nonviolent in nature and caused less damage than the property crimes committed by Ewing ($20, only one-sixtieth of the financial damage caused by Ewing) and Andrade (7½ times less than that caused by Andrade). That his crime has been characterized by the California legislature as a felony, rather than a misdemeanor or a wobbler offense, has no bearing on whether and to what extent the imposition of a life sentence is unconstitutionally disproportionate to the

gravity of that offense. The Constitution requires individualized assessments of criminality and culpability; categorical legislative determinations and popular will cannot undermine this Court's power to define the scope and content of the Eighth Amendment.

If the decision below stands, it will have far-reaching effects on sentencing practices not only in California but also in other states, as well as on the political and legislative process involved in drafting and revising repeat offender statutes. While still allowing for harsher penalties for recidivist offenders, it will also serve to reinforce the outer boundaries of what is constitutionally permissible under the Eighth Amendment with regard to low-impact property crimes, emphasizing that zeal in keeping crime rates under control, while commendable, does not justify the imposition of penalties that are clearly excessive in relation to the triggering offense. Intervention by this Court is necessary. Despite *Solem*, *Brown* and *Andrade*, and notwithstanding the concerns expressed in *Riggs* and *Durden*, courts that have considered the application of the Three Strikes Law to nonviolent crimes have refused to apply the Ninth Circuit's reasoning, distinguishing the cases at hand solely on the basis of the defendants' prior criminal history, or on the misdemeanor/felony distinction. Neither distinction, however, is necessarily sufficient, without more, to satisfy the Constitution. *See Solem*, 463 U.S. at 296-297, 303 (invalidating a sentence imposed in a felony case); *Brown*, 283 F.3d at 1028, 1036 (penalty must be proportionate to the last crime committed, even in the face of violent prior offenses such as robbery, including armed robbery).

For all the aforementioned reasons, *Amicus* Hill submits this brief in support of Respondent and urges this Court to uphold the decision of the Ninth Circuit in *Andrade*. Hill further urges this Court to clarify that the constitutionality of California's Three Strikes law as applied to nonviolent

property crimes must be determined through an individualized assessment of the gravity of the offense charged in relation to the penalty imposed, rather than by unchecked deference to legislative and political determinations.

SUMMARY OF ARGUMENT

I. This Court, in *Solem*, 463 U.S. at 291-292, and *Harmelin*, 501 U.S. at 1003, adopted a three-step test to determine the constitutionality of the penalty imposed. Under this test, the Court must first compare the sentence to the gravity of the offense. If that threshold comparison leads to an inference of gross disproportionality, the Court must proceed to compare the sentence imposed with (1) sentences imposed for other crimes in the same jurisdiction, and (2) sentences imposed for the same crime in other jurisdictions. *See Solem*, 463 U.S. at 292; *Harmelin*, 501 U.S. at 1003-1004. Applying these criteria, this Court in *Solem* affirmed the court of appeal's decision holding a life sentence without possibility of parole for issuing a "no account" check disproportionate and in violation of the Eighth Amendment. *See Solem*, 463 U.S. at 303. So, too, the Ninth Circuit in *Andrade* reversed a sentence of 50 years to life, which was imposed for two counts of petty theft. *See Andrade*, 270 F.3d at 767. Like the defendant in *Solem*, Andrade was convicted of a low-impact property crime. Nobody was physically put in harm's way by the defendants' crimes, and the material damage caused was extremely small. Like the defendant in *Solem*, Andrade has no meaningful expectation of parole. Moreover, the core content of Andrade's offense is that of a misdemeanor elevated to felony status by virtue of a legislative decision alone. *See Andrade*, 270 F.3d at 759. These factors raise an inference of gross disproportionality between the crime of conviction and the sentence imposed. This inference is further confirmed by a comparison between Andrade's

sentence and those imposed otherwise in California, and those imposed in the four other states where petty theft triggers the repeat offender law. A sentence of life in prison for the crime of petty theft is unconstitutional and, as such, the Ninth Circuit's decision should be upheld.

II. It would be inconsistent with this Court's controlling case law to limit the protections of the Eighth Amendment to misdemeanor conduct. The crime committed by the defendant in this Court's controlling opinion, *Solem*, was a felony fraud, and it was thus in a felony case that this Court emphasized that the Eighth Amendment prohibits grossly disproportionate sentences. *See Solem*, 463 U.S. at 291-293. Like the misdemeanor crime of petty theft, nonviolent property crimes causing minimal material damage and no risk of harm are insufficiently grave to warrant the imposition of a life sentence, notwithstanding the felony/misdemeanor distinction. Thus, even where a crime is deemed a felony in the first instance without regard to wobbler status, the Eighth Amendment prohibits the application of Three Strikes, where such application results in a grossly disproportionate penalty.

Further, the suspect double counting of petty theft (as in Andrade's case) is not the only instance of double counting contained in the California statute. To the contrary, California Penal Code section 667(a)(1) also allows for the dual use of prior convictions - first to bring an offense into the realm of the Three Strikes Law (and thus, trigger an automatically enhanced penalty of 25 years to life), and then again to further enhance that already-enhanced sentence by five years for each prior conviction counting as a "strike". Significantly, this method of double counting strikes as enhancements is expressly prohibited by other states' repeat offender sentencing schemes. This double counting of prior offenses gives rise to Double Jeopardy concerns.

Other problematic features of the California system include: (1) the overall breadth of its application to low-impact nonviolent property crimes, an approach which presumes the application of the law and constrains judicial discretion in sentencing; (2) the significantly harsher penalties provided for low-impact property offenses; and (3) the substantial unavailability of parole. All these features apply to low-impact nonviolent property crimes regardless of whether the crime of conviction is a misdemeanor or a felony.

For all these reasons, the legislative decision whether to classify an act as a felony or a misdemeanor (or a misdemeanor elevated to felony status for purposes of the Three Strikes Law) cannot, ultimately, determine the scope of protection afforded by the Eighth Amendment. While deference to legislative decisions is less pronounced when the crime of conviction is classified as a misdemeanor rather than a felony, it must be the overall gravity of the crime of conviction, assessed on an individualized basis, which is determinative, not formal political classifications. *See Solem*, 463 U.S. at 291-293. It is true, as Petitioner contends, that the power to define the substance of criminal law is within the province of the State. However, that power is subject to this Court's constitutional mandate to define the scope and content of the Eighth Amendment. California is not free to invoke concepts of federalism and legislative deference to define out of existence federal constitutional protections. More fundamentally, the rights of the accused to be free from cruel and unusual punishment cannot be circumscribed by political or popular will.

III. While the purported aim of California's Three Strikes Law was crime control, that aim has failed. Instead, the law has resulted in a substantially disparate application with regard to the gender and race of the target population, the types of crimes involved, and the sentences imposed.

The arbitrary and inconsistent application of the law within and among different counties of the state further undermines the constitutionality of Three Strikes. The application, prosecution and enforcement of the Three Strikes Law is arbitrary and irrational and, as such, Andrade's sentence cannot be considered proportionate under the Eighth Amendment.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING THAT A FUNCTIONAL LIFE SENTENCE FOR A LOW-IMPACT PROPERTY CRIME IS UNCONSTITUTIONAL IS IN CONFORMITY WITH THE GOVERNING CASE LAW OF THIS COURT.

The controlling three-part test to determine the constitutionality of a sentence under the Eighth Amendment was set forth by this Court in *Solem*, 463 U.S. at 291-292, and *Harmelin*, 501 U.S. at 1003-1004. Pursuant to these decisions, the Court must first compare the gravity of the offense to the harshness of the penalty. If that threshold comparison leads to an inference of gross disproportionality between the crime and the sentence, the Court must proceed to compare the sentence imposed with (1) sentences imposed for other crimes in the same jurisdiction, and (2) sentences imposed for the same crime in other jurisdictions. *See Solem*, 463 U.S. at 292; *Harmelin*, 501 U.S. at 1003-1004. Furthermore, while a state is justified in imposing harsher penalties for recidivists, the enhanced punishment must not be an additional penalty for the earlier crimes but instead "a stiffened penalty for the latest crime, which is considered an aggravated offense" because of its repetitive nature. *See Witte*, 515 U.S. at 400.

This Court in *Solem* affirmed the Eighth Circuit's decision that a life sentence without possibility of parole for issuing a "no account" check was disproportionate and in

violation of the Eighth Amendment's protection against cruel and unusual punishment. *See Solem*, 463 U.S. at 296-297, 303. Conversely, in *Harmelin*, this Court upheld a life sentence imposed for the possession of more than 650 grams of cocaine, emphasizing that the crime was "as serious and violent as felony murder without specific intent to kill." *See Harmelin*, 401 U.S. at 1002. So, too, in upholding a life sentence for obtaining money under false pretenses, which constituted the defendant's third felony, this Court in *Rummel v. Estelle*, emphasized the relatively prompt availability of parole within 10 to 12 years of the defendant's conviction. *See Rummel*, 445 U.S. at 280-281. In fact, according to the *Solem* Court, it was the realistic and relatively liberal availability of parole in *Rummel*, which largely distinguished it from the facts of *Solem*. *See Solem*, 463 U.S. at 301-302.

Like the defendant in *Solem*, Andrade was convicted of a low-impact property crime. Nobody was physically put in harm's way by either of the defendants' crimes, and the material damage caused was extremely small – $150 in stolen videotapes and a $100 "no account" check, respectively. Petitioner urges this Court to discount the fact that Andrade's crime was not a violent one and did not cause great financial damage. However, as the *Solem* Court expressly recognized, the absolute magnitude of the crime, particularly with regard to the violence involved, the resulting harm, and the threat to society, is a key factor in determining the proportionality of the sentence. *See Solem*, 463 U.S. at 292-293 (observing that criminal laws make clear that nonviolent crimes are less serious than crimes marked by violence, that the law is more protective of people than property, and that even in the latter respect, "[s]tealing a million dollars is viewed as more serious than stealing a hundred dollars"). Further, like the defendant in *Solem* and unlike Rummel, Andrade has no meaningful expectation of

parole. He has been sentenced to a functional lifetime prison term, being eligible for parole for the first time only years after his 80th birthday. *See Andrade*, 270 F.3d at 759. Moreover, the core content of Andrade's offense is that of a misdemeanor elevated to felony status by virtue of a legislative decision alone. *See Andrade*, 270 F.3d at 759. These factors raise an inference of gross disproportionality between the crime of conviction and the sentence imposed.

This inference is confirmed by a comparison of the sentences imposed under California's Three Strikes Law to other sentences imposed in California and the statutory schemes of other states. While Andrade's offenses would ordinarily be punishable by a fine not exceeding $1,000, or by imprisonment in the county jail not exceeding six months, or both (*see* Cal. Penal Code § 490), under the Three Strikes Law they are punished more severely than voluntary manslaughter, mayhem and arson. *See* Cal. Penal Code §§ 193, 204 and 451, respectively. In fact, by virtue of California Penal Code section 667 alone, for two counts of petty theft, Andrade was punished more severely than a defendant convicted of one count of first-degree murder, which carries a penalty of 25 years to life. *See* Cal. Penal Code § 190(a).

On the level of the intrajurisdictional comparison, only four other states have recidivist offender statutes which apply to petty theft at all, and all of these schemes contain features which ultimately would have made a less severe punishment a distinct probability. West Virginia does not count nonviolent priors, Texas has a liberal parole policy, the Rhode Island statute applies only to thefts of more than $100, and in Louisiana, a sentence comparable to that imposed in California might well have been invalidated as excessive under the state's constitution. *See Andrade*, 270 F.3d at 763-765 (detailing the penalty schemes of Rhode Island, West Virginia, Texas and Louisiana). Significantly,

no other state permits double counting of the defendant's crime of conviction. *See Riggs*, 525 U.S. at 1114. Only California's statutory scheme uses the defendant's recidivism to elevate petty theft to felony status and then raise the penalty from a fine or one-year term in the county jail to a term of 25 years to life in prison. California's Three Strikes Law contains another constitutionally problematic example of double counting, which affects other crimes, including attempted residential burglary. Specifically, California's law uses the defendant's prior offenses first to bring the case within the realm of the habitual offender statute and then again for further sentence enhancements. *See* Cal. Penal Code § 667(a)(1). Such double counting is not permitted in other states and is expressly prohibited by statute in North Carolina and Wisconsin. *See* N.C. Gen. Stat. § 14-7.6; Wis. Stat. Ann. § 973.12(2). In Indiana, the application of the recidivist statute has been held in violation of that state's constitutional prohibition against excessive sentences where it has the effect of double counting prior felonies. *See Wood v. State*, 734 N.E. 2d 296, 298-299 (Ind. 2000).

Taking all these circumstances into account, the Ninth Circuit's decision on review before this Court is squarely within the parameters established by *Solem* and *Harmelin*. *Rummel* is clearly distinguishable.

II. IT WOULD BE INCONSISTENT WITH THIS COURT'S CONTROLLING CASE LAW TO LIMIT THE PROTECTIONS OF THE EIGHTH AMENDMENT TO MISDEMEANOR CONDUCT.

Andrade's crime of conviction was misdemeanor petty theft and, as such, a seemingly obvious distinction between misdemeanor and felony conduct could be drawn in defining the protective scope of the Eighth Amendment. In fact, several Justices of this Court have expressed concern over

the inclusion of a traditional misdemeanor offense, which has been upgraded to felony status, in the catalogue of offenses that trigger the application of California's Three Strikes Law. *See Riggs*, 525 U.S. at 1114; *accord*, *Durden*, 531 U.S. at 1184. However, by simultaneously granting certiorari in the matter of *Ewing v. California*, a case involving the theft of three golf clubs worth $399 each (and thus, an offense classified as a felony), this Court has indicated that it is concerned with more than the limited facts of *Andrade*. *See Ewing*, 122 S.Ct. at 1435; *Ewing*, 2001 Cal. LEXIS 4704; *Ewing*, 2001 WL 1840666. Yet, the offense committed in *Ewing*, too, was a theft which, in the court's discretion, could have been downgraded to misdemeanor status. Like Andrade's crime, it was a so-called "wobbler" offense. *See id.* Conversely, the crime committed by the defendant in this Court's controlling opinion, *Solem*, was felony fraud. Significantly, therefore, it was in the context of a *felony* case that this Court clarified the Eighth Amendment prohibition on grossly disproportionate sentences and, in so doing, recognized that no sentence is *per se* constitutional. *See Solem*, 463 U.S. at 290, 291-293.

This Court's dissenting Justices in *Riggs* recognized the fundamental similarity between petty theft and the felony crime committed by the defendant in *Solem*, in that neither "involves . . . violence nor [the] threat of violence to any person; the amount of money involved is relatively small; and the State treats the crime as a felony." *See Riggs*, 525 U.S. at 1114 (internal citations omitted). It would be inconsistent with this Court's controlling case law to limit the protections of the Eighth Amendment to misdemeanor conduct or wobbler offenses. Like the misdemeanor crime of petty theft, nonviolent property crimes causing minimal material damage and no risk of harm are insufficiently grave to warrant the imposition of a life sentence, notwithstanding

the felony/misdemeanor distinction.[2] Thus, even where a crime is deemed a felony in the first instance without regard to wobbler status, the Eighth Amendment prohibits the application of Three Strikes, where such application results in a grossly disproportionate penalty.

Moreover, the suspect double counting of petty theft characterized as a "unique quirk" of California law by the dissenting Justices in *Riggs*, *see* 525 U.S. at 1114, is not the only instance of double counting contained in the California statute. Thus, any contention that *Andrade* should be limited to misdemeanor or wobbler offenses alone should be rejected. The statute also allows for the dual use of prior convictions first to bring an offense into the realm of the Three Strikes Law (and thus, trigger an automatically enhanced penalty of 25 years to life), and then again to further enhance that already-enhanced sentence by five years for each prior conviction counting as a "strike". Cal. Penal Code § 667(a)(1).[3] As this Court has repeatedly recognized, the double counting of prior offenses gives rise

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[2] The facts surrounding Hill's life sentence illustrate the point. Hill's offense of attempted residential burglary, although equally nonviolent and causing less damage than was the case in *Solem*, *Ewing* and even *Andrade* ($20, only one-sixtieth of the financial damage caused by Ewing, 7½ times less than that caused by Andrade, and one-fifth that caused by the *Solem* defendant), is statutorily classified as a felony, without regard to an individualized assessment of the gravity of his offense, and without discretion for the court to downgrade the classification to misdemeanor status. Further, unlike the *Andrade*, *Ewing* and *Solem* defendants' crimes, Hill's crime never progressed beyond the stage of attempt, a circumstance this Court has expressly recognized as one of the determinative factors in the context of the Eighth Amendment. *Solem*, 463 U.S. at 293 (stating that "attempts are less serious than completed crimes.").

[3] In Hill's case, this resulted in a further enhancement of the already-enhanced minimum term by 60%, from 25 to 40 years, and a corresponding delay in his eligibility for parole by the same amount of time.

to Double Jeopardy concerns when it is unclear in what way exactly the prior offenses are considered. Specifically, the enhanced punishment imposed for the present offense must not be an additional penalty for the earlier crimes but instead "a stiffened penalty for the latest crime, which is considered an aggravated offense" because of its repetitive nature. *See Witte*, 515 U.S. at 400; *Moore v. Missouri*, 159 U.S. 673, 677 (1895). Petitioner contends that California's statutory scheme adequately takes into account the defendant's recidivism without counting his prior offenses twice. *See* Pet.'s Brief, pp. 14-15. To the contrary, California's law transgresses the line between a "stiffened penalty for the latest crime" and an additional penalty for the earlier crimes. Not only does the California statute mandate the double counting of a prior misdemeanor offense in the context of elevating the defendant's current offense to felony status, it also specifically provides for further sentence enhancements of five years for every prior offense counting as a strike "*in addition to*" the [already-enhanced] "sentence imposed by the court for the present offense". Cal. Penal Code § 667(a)(1). These additional sentence enhancements have no recognizable connection to the crime of conviction and apply with equal force to misdemeanor and felony conduct. As such, they are double penalties for the defendant's prior crimes. By contrast, other states specifically prohibit any form of double counting and expressly provide that any enhanced penalty for the defendant's crime of conviction is merely enhanced (once) because that crime is a repeated one. *See* N.C. Gen. Stat. § 14-7.6; Wis. Stat. Ann. § 973.12(2); *see also Wood*, 734 N.E. 2d at 298-299.

Other aspects, which significantly distinguish California's Three Strikes Law from other repeat offender statutes, further confirm that California's refusal to require an individualized assessment of the gravity of each offense

renders the application of that law to nonviolent property crimes unconstitutional. First, and most notably, some states' recidivist statutes do not apply to low-impact property crimes, including felonies such as attempted burglary. More specifically, the repeat offender statutes of Illinois, Maryland, Virginia and Wyoming are not applicable to low-impact property crimes such as residential burglary. *See e.g.* 720 Ill. Comp. Stat. 5/33B-1; 27 Md. Code Ann. § 643B; Va. Code Ann. § 19.2-297.1; Wyo. Stat. Ann. §§ 6-1-1-4(xii), 6-3-301(a), 5-10-201(a). According to these states' statutory schemes, individuals committing attempted residential burglary are punished under the standard sentencing guidelines, which, for example, provide for a prison term of three to seven years in Illinois, or up to 10 years in prison in Virginia and Wyoming. *See* 730 Ill. Comp. Stat. 5/5-8-1;[4] Va. Code Ann. §§ 18.2-10, 18.2-26 and 18.2-91; Wyo. Stat. Ann. §§ 6-1-3-1(a).

Furthermore, several states permit the court wide discretion in determining the applicability of the habitual offender statute. In Connecticut, for example, a repeated offense *may* be treated as an offense of a higher class and thus punished more severely if the court determines such a penalty to be in the public interest. *See* Conn. Gen. Stat. §§ 53a-35a, 53a-40(c), 53a-103. In Florida, the court may similarly abstain from sentencing the defendant under the repeat offender statute if such a sentence is not necessary for the protection of the public. *See* Fla. Stat. Ann. § 775.084(4)(e). In Hawaii, too, the court can abstain from imposing the minimum sentence otherwise called for under the state's repeat offender law if there are mitigating

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[4] 730 Ill. Comp.Stat. 5/5-5-3.2(b)(1), without bringing the crime within the realm of the repeat offender statute, allows for certain sentence enhancements pursuant to 730 Ill. Comp. Stat. 5/5-8-2 if the defendant has been convicted of a felony of the same or greater degree within the past 10 years.

circumstances, such as the fact that the defendant's criminal conduct neither caused nor threatened serious harm. *See* Hawaii Rev. Stat. §§ 706-606.5(5), 706-621(2)(a). In Idaho, while the state's statute provides for a mandatory minimum term of five years (which may extend to life) for a third felony conviction, *see* Idaho Code § 19-2514, courts have repeatedly emphasized the sentencing judge's wide discretion within the confines of the statute, which is mandatory only with regard to the five-year minimum term. *See State v. Holton*, 813 P.2d 923, 924 (Id. App. 1991) and *State v. Sena*, 674 P.2d 454, 458 (Id. App. 1983). Other states' recidivist statutes likewise provide for discretion in their application. *See e.g.* Nev. Rev. Stat. Ann. § 207.010.2; N.J. Stat. Ann. §§ 2C:18-2, 2C:43-7 and 2C:44-3; Vt. Stat. Ann. tit. 13, § 11; *see also State v. Serr*, 664 P.2d 1301, 1305 (Wash. 1983) (prosecutorial discretion).

All these statutes not only provide for less-severe sentences in the context of their respective recidivist statutes – typically, maximum terms of up to 10 years – but they also require the sentencing judge to decide whether an enhanced sentence in application of the repeat offender statute is required *at all*. Such a sentence, then, is not presumed, but rather requires an affirmative determination, in each individual case, of whether or not it is necessary. Conversely, while California Penal Code section 1385(a) provides the court with some limited discretion to dismiss prior strikes under certain circumstances, California law presumes that "[t]he Three Strikes law . . . *takes the place* of whatever law would otherwise determine defendant's sentence for the current offense." *Romero*, 917 P.2d at 643. Thus, in stark contrast to the statutory schemes of Connecticut, Florida, Hawaii, Idaho, Nevada, New Jersey and Vermont, in California the court *presumes* that a third-time offender's case calls for a substantially longer sentence under Penal Code section 667 based on the existence of the

defendant's prior offenses alone. The sentence then imposed falls out of that realm only if the court is permitted to exercise its discretion to strike enough prior strikes. California's approach, thus, is the reverse of that followed in the aforementioned other states.

Even where the imposition of enhanced sentences under the recidivist statute is not discretionary *per se*, other states provide for penalties significantly less severe than those imposed in California for low-impact felonies such as attempted residential burglary and other nonviolent property crimes. *See, e.g.*, Ariz. Rev. Stat. §§ 13-1507, 13-1001.C and 13-604(C) (eight to twelve years, presumptive term: 10 years for attempted unarmed residential burglary committed by a repeat offender); Tenn. Code Ann. §§ 39-14-403, 39-12-107, 40-35-106(a)(1) and 40-35-112(b)(4) (four to eight years for attempted residential burglary committed by a repeat offender) and Wis. Stat. Ann. §§ 939.32(1), 939.50(3)(c), 939.62(1)(b) and 943.10(1)(a) (up to 13½ years for recidivist attempted burglary).

Furthermore, many states provide for individualized penalty scales, depending on the seriousness and/or violence of the last offense being punished. Hawaii, North Carolina and New York, in particular, each have multiple repeat offender statutes containing detailed distinctions between the number and types of offenses, the level of violence, and the danger involved. *See* Hawaii Rev. Stat. § 706-606.5; N.C. Gen. Stat. §§ 14-7.1, 14-7.7 and 14-7.12; N.Y. Penal Law §§ 70.04, 70.06, 70.08 and 70.10; N.Y. Criminal Procedure Law §§ 400.15, 400.16, 400.20 and 400.21.[5]

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[5] *See further* Ala. Code § 13A-5-9; Alaska Stat. §§ 12.55.125 and 12.55.155; Ark. Code Ann. §§ 5-4-501, 16-90-201; Colo. Rev. Stat. § 16-13-101; Conn. Gen. Stat. § 53a-40; Fla. Stats. Ann. § 775.084; Ga. Code Ann. § 17-10-7; La. Rev. Stat. Ann. § 15:529.1; Mo. Rev. Stat. § 558.016; N.J. Stat. Ann. §§ 2C:18-2, 2C:43-7 and 2C:44-3; Ohio Rev. Code Ann. §§ 2929.12 – 2929.14 (as amended); Or. Rev. Stat. §§ 161.725 and 161.737; Pa.

Significantly, even compared with those states where the sentence imposed in the case of a repeat offender would be more severe, the unavailability of parole distinguishes the punishment handed down under California law. Petitioner argues that the situation in California is akin to that underlying this Court's decision in *Rummel*, 445 U.S. at 280, and contends that the possibility of parole is not entirely insignificant here. *See* Pet.'s Brief, pp. 12, 19-20.[6] Petitioner's contention is without merit. Under California Penal Code section 667, a recidivist offender is not eligible for parole before he has served a minimum term of 25 or more years (in Andrade's case: 50 years) – more likely than not, the rest of the defendant's natural life. It was precisely this type of ineligibility for parole that gave rise to the determination of gross disproportionality in *Solem*. *See id.*, 463 U.S. at 301-302. This substantially distinguishes the situation in California from that underlying *Rummel*, where the defendant was eligible for parole after only 10 to 12 years. *See Rummel*, 445 U.S. at 280-281.

The lack of a realistic possibility of parole renders California's law more punitive in comparison to other

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Cons. Stat. § 9714; S.C. Code Ann. § 17-25-45 (as amended); Tex. Penal Code § 12.42 (held unconstitutional as applied to specific facts in *Scott v. State*, 55 S.W.3d 593 (Tex. Crim. App. 2001)); Utah Code Ann. 76-3-203.5; Vt. Stat. Ann. tit. 13, §§ 11 and 11a; Wyo. Stat. Ann. § 6-10-201.

[6] Petitioner urges that whenever a defendant's punishment consists of a term of years, even the most unlikely and remote eligibility for parole is sufficient to distinguish such a penalty from a life sentence. *See* Pet.'s Brief, pp. 19-20, 24. However, as this Court emphasized in *Solem*, and contrary to Petitioner's assertions, the determination of the proportionality of the sentence imposed is *not* a matter of drawing a single bright line between "life without parole" sentences and functional life sentences only nominally expressed in years. Rather, it requires an evaluation of the circumstances surrounding each individual case; and the realistic availability of parole is a factor which must always be considered. *See Solem*, 463 U.S. at 294-295, 301-302; *see also Barker v. Wingo*, 407 U.S. 514, 533 (1972).

jurisdictions as well. For example, under the Arkansas parole provisions, individuals serving time for low-impact ("Class C") felonies become eligible for parole after serving one-third of their sentence. *See* Ark. Code Ann. § 16-93-608. In Montana, a prisoner may be paroled after having served one-fourth of his term. *See* Mont. Code Ann. § 46-23-201(2). In Nevada and New Hampshire, most repeat offenders are eligible for parole after having served a minimum of 10 years or less. *See* Nev. Rev. Stat. Ann. §§ 207.010.1(b)(2) and (3), 207.012; N.H. Rev. Stat. Ann. §§ 651-A:6(I), 651:6(I)(c) and (II)(a). Offenders committing a low-impact felony such as attempted residential burglary in Texas become eligible for parole after serving one-quarter of the sentence or 15 years, whichever is less. *See* Tex. Gov't Code § 508.145; *see also Rummel*, 445 U.S. at 280-281 (10–12 years). In Wisconsin, a defendant sentenced to one or more years in prison is eligible for parole after having served 25% of his sentence or six months, whichever is greater. *See* Wis. Stat. Ann. § 304.06(1)(b). In Wyoming, a defendant convicted of a low-impact felony such as attempted residential burglary is eligible for parole after having served the minimum term set by the trial court with a maximum sentence of up to 10 years. *See* Wyo. Stat. Ann. §§ 6-1-301(a), 6-3-301(a), 7-13-402(a).

Lastly, in several states where repeat offender statutes would otherwise mandate the imposition of life sentences (with or without a minimum term substantially higher than 10 or 15 years), state supreme courts have found such harsh sentences for nonviolent crimes involving little or no material damage unconstitutional under the respective provisions of their state constitutions' prohibitions against disproportionate sentencing. *See, e.g., Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 214 (W.Va. 1981) (imposition of a life sentence for the third felony of forging a $43.00 check violates the West Virginia Constitution's

proportionality principle); *accord, State v. Davis*, 427 S.E.2d 754, 757 (W.Va. 1993) (burglary); *State v. Hedrick*, 391 S.E.2d 614, 622 (W.Va. 1990) (same); *see also State v. Fain*, 617 P.2d 720, 726 (Wash. 1980) (quoting *Rummel*, 445 U.S. at 295 and holding unconstitutional a life sentence for low-impact property crimes where "[n]one of the crimes involved injury to one's person, threat of injury to one's person, violence, the threat of violence, or the use of a weapon").

When compared to other statutory schemes, California's Three Strikes Law imposes penalties for misdemeanor conduct and low-impact felonies which are not only substantially harsher than those in other jurisdictions but, as detailed above, also are disproportionate to the crime of conviction; without, at the same time, providing for a realistic possibility of parole. Nevertheless, and notwithstanding *Solem*, *Andrade*, *Brown*, *Durden* and *Riggs*, courts that have reviewed the application of California Penal Code section 667 to nonviolent crimes have uniformly rejected Eighth Amendment claims on the basis of the defendant's prior criminal history or on the basis of the felony/misdemeanor distinction.[7] However, as illustrated *supra*, neither distinction has any merit. *See Brown*, 283 F.3d at 1028, 1036 (penalty must be proportionate to the last crime committed, even in the face of violent prior offenses such as robbery, including armed robbery); *Solem*, 463 U.S. at 296-297, 303 (invalidating a sentence imposed in a felony case). *Amicus* therefore urges this Court to clarify that the constitutionality of California's

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[7] *See Franklin v. Lewis*, No. C 00-3421, 2002 WL 552333 (C.D. Cal. Apr. 9, 2002) (second-degree burglary); *Esparza v. Lockyer*, No. C 99-3781, 2001 WL 1528384 (N.D. Cal. Nov. 20, 2001) (driving under the influence); *People v. Romero*, No. E030010, 2002 WL 1481257 at *1 (Cal. App. July 11, 2002) (petty theft).

Three Strikes Law as applied to nonviolent property crimes must be determined through an individualized assessment of the gravity of the offense charged in relation to the penalty imposed, rather than by unchecked deference to legislative and political determinations or by reliance on prior convictions alone.

Petitioner repeatedly contends that the California legislature was justified in enacting Penal Code section 667 and urges this Court to uphold the statute as applied to nonviolent property crimes in its current form. *See* Pet.'s Brief, pp. 13-14, 16-17, 18-19, 22-23. Petitioner further contends that this Court should defer to California's legislative determinations and expressions of political and popular will. However, *Amicus* respectfully submits that the legislative decision whether to classify an act as a felony or a misdemeanor (or a misdemeanor elevated to felony status for purposes of the Three Strikes Law) cannot, ultimately, determine the scope of protection afforded by the Eighth Amendment. While deference to legislative decisions is less pronounced when the crime of conviction is classified as a misdemeanor rather than a felony (*see Riggs*, 525 U.S. at 1114), it is always the gravity of the offense which must be determinative, *not* its formal classification. *Solem*, 463 U.S. at 292-293. The protections of the Eighth Amendment rest on the proportionality of the crime of conviction to the penalty imposed and on an individualized assessment of the gravity of *that* crime. The substantive protection of the Eighth Amendment simply does not hinge on legislative classifications or political distinctions between misdemeanor and felony conduct, or on the democratic decision to "get tough on crime." *See Solem*, 463 U.S. at 291-293; *Witte*, 515 U.S. at 400.

While states are justified in punishing recidivist offenders more harshly, they are not justified in legislating away a criminal defendant's constitutional rights.[8] California's power to criminalize, classify, and punish behavior is subject to the constitutionally mandated power of this Court to define the scope and content of the Eighth Amendment. As Petitioner concedes, California's Three Strikes Law is the expression of a decade of legislation under the motto "get tough on crime." Contrary to Petitioner's arguments, *see e.g.* Pet.'s Brief pp. 13-14, the statute's provisions are *not* based on the gravity of the offenses concerned. *See* Michael Vitiello, *Three Strikes: Can We Return To Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997); FRANKLIN E. ZIMRING, GORDON HAWKINS, SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA, Oxford University Press 2001, pp. 5-6. Notwithstanding Petitioner's assertions to the contrary, Three Strikes is not immune from constitutional scrutiny merely because it appears to pursue a rational goal such as crime prevention, or because it involves the exercise of legislative judgment. On Petitioner's reasoning, there is virtually no limit to the type of act which could be subjected to severe criminal punishment, so long as the state articulates a rational goal. However, it is the province, indeed, the duty of this Court, to check the exercise of that judgment and ensure that the application of California's statutory scheme passes

[8] Indeed, *Amicus* respectfully submits that if this Court were to define the constitutional floor solely in terms of categorical and politically determined classifications, such as the felony/misdemeanor distinction, then states would be free to define out of existence Eighth Amendment protections simply by deeming all crimes to be felonies. Rather, the constitutional inquiry must turn on an individualized assessment of the gravity of the last offense charged, regardless of the state's legislative classifications.

constitutional muster as applied to every *individual* case. *Amicus* submits that in many cases, it does not.

III. THE POLITICAL AND LEGISLATIVE GOALS PURSUED BY THE ENACTMENT OF CALIFORNIA'S THREE STRIKES LAW HAVE FAILED, AND THE LAW PRODUCES DISPARATE RESULTS.

Petitioner asserts that California's Three Strikes Law targets only those criminals who pose the greatest danger to society, and that it is effective in deterring recidivist offenders. *See* Pet.'s Brief, pp. 17, 21. A closer analysis of the statute's history and effect to date shows that this rather sweeping assumption, while reflecting popular sentiment, is in fact not sustainable.

California's Three Strikes Law was passed on a wave of popular support for "tough" crime control legislation after the abduction, sexual assault and murder of Polly Klaas, a 12-year-old girl from a small Northern California town. *See* ZIMRING, HAWKINS, KAMIN, pp. 5-6. By the end of 1998, four years after the law had been passed, California had generated more than 40,000 sentences under that statute. In sharp contrast, each of the other jurisdictions that had recidivist offender laws at that time had accumulated less than 1,000 sentences under their respective statutes. Fourteen of those other jurisdictions had even fewer than ten sentences each, and the federal system had 35. *See id.* at 20-21, 224. Yet, in 1993, the year prior to the passage of the California law, only 4.3% of all felony convictions involved defendants who had a record of two or more prior offenses, and only 9.6% of all defendants had one prior conviction. Thus, 86% of all defendants were first-time offenders. *See id.* at 43. Similarly, of the defendants arrested for violent felonies, 87% had no criminal record, 9.6% had one prior conviction, and only 3% had two or more prior convictions. *See id.* at 46.

At the same time, the statute disproportionately targeted male and African-American defendants. Whereas in 1993, the number of male defendants was roughly five times as high as that of female defendants, the ratio of male defendants who would have been subject to punishment under California Penal Code section 667 one year later for at least a second or third offense was 19 times that of the number of female defendants (approximately 95% male, compared to 5% female defendants). *See* ZIMRING, HAWKINS, KAMIN, p. 55. Similarly, in 1993, the year before the Three Strikes Law went into effect, the percentages of first-time African-American, Hispanic and Caucasian offenders were within 10 percentage points of each other. The number of African-American defendants who would have been eligible for sentencing under the Three Strikes Law, however, was twice that of Hispanic and Caucasian defendants for second strikers (50%, compared to 24% Caucasians and 26% Hispanics). Of the defendants convicted of a third or higher number of offenses, the number of African-Americans was three times that of Caucasians and four times that of Hispanics (64%, compared to 21% and 16% respectively). *See id.* at 57.

So, too, there is disparity in the degree to which the new law enhanced the minimum sentences imposed for different types of crimes. For example, the minimum term for rape was raised by a little over four times (from six to 25 years). The minimum term for second-degree burglary, however, a significantly less serious crime and, like theft, a so-called wobbler offense, which can be charged as either a misdemeanor or a felony, was raised by a factor of 25 (from one to 25 years). The minimum term for grand theft was raised 12½ times (from two to 25 years). Thus, the escalation of punishment under the Three Strikes Law is diametrically opposite to the gravity of the crime of conviction. Similarly, there is no difference between the

minimum term imposed on a recidivist offender whose third crime of conviction is rape, and that imposed in the case of a repeat offender whose third crime of conviction is second-degree burglary or petty theft. These features are plainly inconsistent with the statute's stated goal of providing punishment that is proportionate to the offense charged. *See* Cal. Penal Code §§ 667(b), 1170(1)(a); *see also* ZIMRING, HAWKINS, KAMIN, pp. 120-121.

While in the years following the passage of California Penal Code section 667 the median and mean prison terms for first-time offenders stayed approximately the same, *see* ZIMRING, HAWKINS, KAMIN, p. 57, there were dramatic increases in the terms imposed in repeat offender cases. For third-strikers alone, the median prison term increased by 200% from 24 to 72 months, and the overall mean term increased by more than 400%, from roughly 28 to 123 months. The effect of the new law was to create a significant bias in the distribution of punishments, producing an increased disproportion of sentences in the process. *See id.* at 74-75. While this trend was apparent with regard to all types of offenses, it was noticeable particularly with regard to nonviolent property crimes such as burglary and theft. The mean incarceration of burglary first-strikers increased over threefold (from 27 to 88 months), that of burglary multiple-strikers fivefold (from 27.5 to 139.2 months). While the mean incarceration of theft first-strikers increased only by a little over one-fourth (from 23 to 28 months), that of theft multiple-strikers jumped to almost seven times its prior length, from 12.4 to 83.3 months. In individual cases like Andrade's, the actual disparity is even greater. *See id.* at 77, 122-123. Statistically, the expected cumulative burden of the admission of third-time repeat offenders sentenced to a prison term of 25 years to life in the California prison system is, on average, 20 times larger in its 20th year as it is

in its first year, and the expected cumulative effect of second-strike offenders is even greater. *See id.* at 135, 137.

At the same time, the application of the new law throughout California has been extremely uneven, in that in San Francisco and Alameda Counties, for example, little net change occurred as a result of the Three Strikes Law alone. In contrast, courts in San Diego, Los Angeles and Sacramento Counties immediately started to make ample use of the law's 25-years-to-life sentencing feature, bringing the number of convictions under the statute to a total of seven times those in San Francisco and Alameda Counties. *See* Mile Males, *Striking Out: The Failure of California's 'Three Strikes and You're Out' Law*, 11 STAN. L. & POL'Y REV. 65, 68 (1999); Samara Marion, *Justice by Geography? A Study of San Diego County's Three Strikes Sentencing Practices from July – September 1996*, 11 STAN. L. & POL'Y REV. 29 (1999); ZIMRING, HAWKINS, KAMIN, pp. 81-83. Similarly, while 80% of the longest pre-Three Strikes Law sentences were handed down for violent offenses, almost half of the longest prison terms imposed after the passage of the statute were sentences for nonviolent crimes, and a majority of the penalties of 15 years or more were for property crimes resulting in a third strike 25-years-to-life sentence. All of these sentences were significantly longer than those for the much more serious crimes of murder, voluntary manslaughter and robbery imposed after the Three Strikes Law took effect. These disparate impacts plainly belie the language of Penal Code section 1170, which characterizes the statute's purpose as being "best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentence of an offender committing the same offense under similar circumstances."

See Cal. Penal Code § 1170(1)(a); ZIMRING, HAWKINS, KAMIN, pp. 117-118, 195.[9]

Significantly, while crime control was a pronounced purpose of California's Three Strikes Law, the existing downward trend in the state's crime rate cannot be attributed to the passage of the statute. First, the trend began in October 1991, long before passage of the statute was even considered likely, let alone before it actually took effect. Second, the trend did not increase in significance after the law took effect. Rather, the rate of decrease stayed approximately the same. Third, there was no statistically significant decline of the share of the law's target groups in the total crime committed before and after the passage of the law. Fourth, although the absolute numbers of years of incarceration in California are significantly higher than those recorded nationwide, the trend in California mirrors that in the United States as a whole, regardless of the existence and scope of repeat offender-statutes elsewhere, both with regard to the decline in crime and with regard to rates of incarceration. *See* ZIMRING, HAWKINS, KAMIN, pp. 88, 96-98, 101, 154-159.

Consequently, the only results thus far achieved by the Three Strikes Law are gross disparities in sentencing with regard to the gender and racial makeup of the target population and with regard to the prison terms provided and imposed (both on average and with regard to individual types of crimes). The arbitrary and inconsistent application of the law within and among different counties of the state further undermines the constitutionality of Three Strikes, both generally and as applied to nonviolent crimes. While the purported aim of California's Three Strikes Law was crime control, that aim has failed. The disparate application,

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[9] The death risk from robbery is 50 times as great as from burglary. *See* ZIMRING, HAWKINS, KAMIN, p. 195.

prosecution and enforcement of the Three Strikes Law must be considered in this Court's evaluation of the constitutionality of California's imposition of a lifetime sentence for the commission of a nonviolent property crime. Given these serious flaws, Andrade's sentence cannot be considered proportionate under the Eighth Amendment.

CONCLUSION

For all the aforementioned reasons, *Amicus* Hill respectfully urges this Court to uphold the decision of the Ninth Circuit.

Respectfully submitted,

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